Nos. 78-1545 and 80-951 (Consolidated)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ANNE B. ZIPES, et al.,

Petitioners,

vs. No. 78-1545

TRANS WORLD AIRLINES, INC.

Respondent,

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Petitioner,

vs. No. 80-951

TRANS WORLD AIRLINES, INC., and ANNE B. ZIPES, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT APPENDIX
VOLUME I

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PETITION FOR CERTIORARI IN NO. 78-1545 FILED APRIL 10, 1979 AND IN NO. 80-951 ON DECEMBER 12, 1980. CERTIORARI GRANTED MARCH 9, 1981.

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Entries are in District Court Case # 70 C 2071 except as noted.

8-18-70	Filed complaint
8-20-70	Order that cause be assigned to Judge Perry, as being related to 70 C 2069 pursuant to Rule 10B 4(c) of the General Rules of this court
9-30-70	Filed Answer
3-4-71	Filed motion of plaintiffs for summary judgment
7-16-71	Filed defendant's petition, and notice of settlement hearing, and agreement of compromise and settlement Entered order and order to show cause. Hearing to determine fairness of agreement and to show cause set for 1:30 p.m., August 30, 1971
8-6-71	Filed EEOC's motion to intervene
8-11-71	Entered order motion to intervene denied
8-12-71	Filed notice of appeal by EEOC
8-25-71	Filed order of U.S.C.A. 7th Circuit No. 71-1615 that the emergency motion of EEOC be granted and further proceedings be stayed
2-23-72	Filed opinion of U.S.C.A. No. 71-1615 denying EEOC motion to intervene
3-10-72	Hearing on objections to proposed settlement
3-17-72	Settlement approved and judgment order entered
4-11-72	Filed notice of appeal by Patricia A. Santini, Pamela J. Dailing, and Anne B. Zipes
5-22-74	Filed order from U.S.C.A. No. 72-1335 reversing judgments of district court
7-15-74	Entered order assigning case to Judge McLaren
7-22-74	Filed complaint in No. 74 C 2063
9-11-74	Filed TWA's motion to dismiss in No. 74 C 2063
9-16-74	Filed defendant's motion to amend answer

9-16-74	Entered order appointing Patricia A. Santini, Pamela J. Dailing and Anne B. Zipes class counsel and Arnold I. Shure and Charles Pressman class counsel. Ruling date on motion to amend is set for November 4, 1974 at 10 a.m.
10-2-74	Filed amended motion to dismiss of ALSSA in No. 74 C 2063
10-10-74	Filed order approving plaintiffs' notice to class
11-19-74	Entered order consolidating cases for purposes of discovery pretrials etc.
11-21-74	Entered memorandum opinion and order granting defendant's motion to amend answer
12-16-75	Filed defendant's motion for order excluding certain persons from class for lack of subject-matter jurisdiction
12-17-75	The motion for the exclusion of certain persons of the class for lack of subject matter jurisdiction is entered and continued until after the court rules on plaintiffs motion for summary judgment and at that time a briefing schedule will be established re: the motion to exclude. —McLaren, J.
3-12-76	Entered order assigning cause to Judge McGarr
3-16-76	Filed defendant's motion for order establishing briefing schedule on jurisdiction motion, affidavit Doris Owen, and Exhibit A
7-9-76	Filed plaintiffs' motion for summary judgment
10-19-76	Enter order dated October 15, 1976: Pursuant to memorandum opinion and order entered this day, defendants' motion to exclude certain persons from the class for lack of subject matter jurisdiction is denied.
10-19-76	Enter order dated October 18, 1976: Pursuant to memorandum opinion and order entered this day, plaintiffs' motion for summary judgment on the issue of TWA's liability for violation of Title VII of the Civil Rights Act is granted.

12-16-76	Enter order dated December 15, 1976. Enter amendment to order that the orders entered on October 18, 1976 granting Summary Judgment against Trans World Airlines, Inc., and on October 15, 1976 denying Trans World Airlines' motion to exclude are amended by adding the following to each order: This court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. Draft-McGarr, J.
2-7-77	Filed certified copy of order from U.S.C.A. 7th circuit dated February 3, 1977: It is ordered that the District Court defendants, American Airlines, Inc., and Trans World Airlines, Inc. are hereby Granted permission to appeal from the three interlocutory orders entered by the District Court on April 28, 1976, October 15, 1976 and October 18, 1976, as amended on 12/15/76 pursuant to 28 U.S.C. 1292(b)
8-24-78	Opinion of U.S.C.A. for Seventh Circuit in *In re: Consolidated Pretrial Proceedings in the Airline Cases,* Docket No. 77-1325
1-11-79	Petitions for rehearing denied in Court of Appeals Docket No. 77-1325
6-29-79	Filed 6-27-79, Settlement agreement. Enter order dated 6-26-79: Plaintiffs' proposed settlement agreement is entered. The form of a notice to class members is hereby approved. Hearing on approval of settlement set for July 31, 1979 at 10 A.M.
7-27-79	Filed 7-25-79, Independent Federation of Flight Attendants' motion to intervene
8-6-79	Enter order dated 8-3-79: Motion of Independent Federation of Flight Attendants to Intervene is granted. Intervenor is granted to and

	including August 10, 1979 to file supplementary memorandum on jurisdiction
8-23-79	Enter order dated 8-23-79: Leave granted to file amendment to settlement agreement
8-23-79	Filed 8-23-79, amendment to settlement agreement
9-19-79	Enter order dated 9-14-79: Union-Intervenor's objection to this court's jurisdiction and authority to approve the proposed settlement agreement is hereby overruled
11-13-79	Enter order dated November 8, 1979: Enter Order approving settlement and dismissing actions
11-13-79	Enter order dated November 8, 1979: Enter order awarding seniority
12-5-79	Filed 12-4-79 intervenor-defendant Independent Federation of Flight Attendants' notice of appeal from order docketed on November 13, 1979
6-13-80	Opinion and judgment of Court of Appeals for Seventh Circuit in U.S.C.A. Docket #79-2460
9-17-80	Order of Court of Appeals in Docket #79-2460 denying petition for rehearing

Rec. No. 2

UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

Air Line Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO; Pamela Dailing; Sadie Sue Lake; Pat Santini; Virginia Hirt; and Bonnie Yoder, *Plaintiffs,*	Civil Action No. 70 C 2071.
vs.	
Trans World Airlines, Inc., *Defendant.*	

COMPLAINT

(Filed August 18, 1970)

Now comes Plaintiffs by their attorneys and complain of the Defendant as follows:

1. This is a class action, authorized and instituted pursuant to Title VII of the Civil Rights Act of 1964, 42 U. S. C. 2000e, et seq. Jurisdiction of the Court is invoked pursuant to 28 U. S. C. 1343(4); 42 U. S. C. 2000e-5(f), 28 U. S. C. 2201 and 2202 and 42 U. S. C. 1981.

2. Plaintiff Air Line Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO (hereinafter referred to as "Plaintiff Union") is a labor union and a representative of employees as defined in the Railway Labor Act, 45 U. S. C. 151.

3. Defendant corporation is a carrier by air and an employer as defined in 45 U. S. C. 151 and 181. Defendant does business in the City of Chicago and State of Illinois. Unlawful employment practices as alleged herein have been committed by

Defendant in the City of Chicago and State of Illinois. Plaintiffs in this cause would have worked in Chicago, Illinois, but for the unlawful employment practice committed by Defendant. Defendant is engaged in an industry affecting commerce, is the employer of more than 100 persons and is an employer within the meaning of 42 U.S.C. 2000e-(b).

4. The individual Plaintiffs named herein were employed by Defendant as female flight cabin attendants prior to the events, and the commission of unlawful employment practices alleged herein. Each individual Plaintiff has been, desires to become and/or in the future will desire to become pregnant. Said Plaintiffs bring this action, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on their own behalf and on behalf of all female flight cabin attendants similarly situated currently employed by Defendants and/or employed by Defendant at any time since July 2, 1965 (hereinafter referred to as the "Class"). There are common questions of law and fact affecting the rights of members of the Class who are, and continue to be, deprived of rights by reason of the unlawful employment practices committed by Defendant as hereinafter alleged. These persons are so numerous that joinder of all members is impracticable. Common relief is sought. The interests of the Class are adequately represented by Plaintiffs. Defendant has acted or refused to act on grounds generally applicable to the Class. The relief requested herein is appropriate with respect to the Class as a whole.

5. Plaintiff Union is, and at all times material herein has been, the certified bargaining representative under the Railway Labor Act of flight cabin attendants employed by the Defendant, including the individual and Class Plaintiffs named and referred to herein. As such representative, the Plaintiff Union has the legal duty to act impartially and fairly represent the interests of the individual Plaintiffs and the Class they represent. The commission by Defendant of unfair employment practices hereinafter alleged jeopardizes the Plaintiff Union's

duty of fair representation to the individual Plaintiffs and the members of the Class. Plaintiff Union brings this action on its own behalf and on behalf of its members within the Class.

6. This is a proceeding (a) for a declaratory judgment as to the rights of the parties, (b) for a preliminary and permanent injunction, restraining and enjoining Defendant from discriminating against members of the Class because of their sex in ways which deprive them of equal employment rights and opportunities and affect their status as employees, and (c) for monetary relief and other appropriate relief.

7. The Defendant has intentionally and willfully engaged in unlawful employment practices, violative of 42 U.S.C. 2000e-2, continuously from July 2, 1965, the effective date of the Act, and still continuing, as follows:

(a) It has maintained a practice, policy or usage whereby it terminates the employment of female flight cabin attendants who become pregnant;

(b) It has, in the course of collective bargaining, demanded of the Plaintiff Union that, contrary to the desire and will of the Plaintiff Union, it accept and accede to a contract provision, practice, policy, or usage whereby female flight cabin attendants employed by it are terminated as employees when they become pregnant.

(c) It has terminated the employment of the individual Plaintiffs and the members of the Class they represent when such female persons, married or single, became pregnant. Such termination of employment has been effectuated by discharge, requested or demanded resignation or refusal to schedule such employees for further flying. Defendant has not terminated the employment of its male employees who have fathered children.

8. In response to a demand by the Plaintiff Union that it cease from the commission of such unfair employment prac-

tices, Defendant, on or about April 7, 1970, affirmed its intention to continue such conduct.

9. Grievances have been filed by the Plaintiff Union and its members under the collective bargaining contract between the Plaintiff Union and the Defendant protesting the aforesaid conduct by Defendant, but Defendant has in all cases denied such grievances.

10. Each of the individual Plaintiffs, and each member of the Class represented by them, has suffered and will continue to suffer irreparable harm by reason of the illegal conduct of Defendant. Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs alleged herein unless this Court affords them the equitable relief prayed for.

11. On or about June 1, 1970, the Plaintiff Union filed a charge with the Equal Employment Opportunity Commission (hereinafter referred to as the EEOC) alleging the aforesaid unfair employment practices. The EEOC notified the Plaintiff Union on July 31, 1970, that it was entitled to initiate a civil action in a United States District Court, as provided in 42 U.S.C. 2000e-5(e) and (f). The Plaintiff Union has its offices in the State of Illinois. Illinois does not have a law prohibiting the unlawful employment practices complained of herein.

Wherefore, Plaintiffs respectfully pray that this Court advance this case on the docket, order a speedy hearing at the earliest practical date, and, upon such hearing:

(a) Declare the rights of the parties, finding that the aforesaid practice, policy, usage and/or contract provision and conduct of the Defendant are violative of the Act;

(b) Grant Plaintiffs and the Class they represent a preliminary and permanent injunction enjoining Defendant from conduct violative of the Act;

(c) Order Defendant by mandatory injunction to take such affirmative actions as are necessary to assure that the

effects of said violations are eliminated and do not continue to adversely affect the employment rights of Plaintiffs and the Class they represent;

(d) Order Defendant to provide monetary relief including back pay to any of the Plaintiffs or members of the Class they represent for monetary losses sustained by them by reason of the violations of the Act by Defendant;

(e) Order Defendant to pay Plaintiffs' costs in this action;

(f) Order the Defendant to pay a reasonable attorneys' fee; and

(g) Order such other and additional relief as to the Court seems necessary or proper.

/s/ Gilbert Feldman
Gilbert Feldman
/s/ Barbara J. Hillman
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Rec. No. 7

* * (Caption—No. 70 C 2071) * *

ANSWER

(Filed September 30, 1970)

Defendant Trans World Airlines, Inc., answers the complaint as follows:

1. Defendant admits the allegations of paragraph 1 that this Court has jurisdiction under Title VII of the Civil Rights Act of

1964, but denies the other allegations of paragraph 1, including the implication that it has violated that Act and that this is a proper class action.

2. Defendant admits the allegations of paragraph 2.

3. Defendant admits the allegations of paragraph 3 that it is a carrier by air as defined in 45 U.S.C. § 151 and § 181, that it does business in the City of Chicago and State of Illinois, that it is engaged in an industry affecting commerce, that it is the employer of more than 100 persons, and that it is an employer as defined in 42 U.S.C. § 2000e-(b). Defendant denies the other allegations of paragraph 3, including the allegations that it has committed unlawful employment practices in the City of Chicago and State of Illinois, or elsewhere, and that plaintiffs Pamela Dailing, Sadie Sue Lake, and Pat Santini would have worked in Chicago, Illinois, but for the termination of their employment by defendant.

4. Defendant admits the allegations of paragraph 4 that the individual plaintiffs were formerly employed by it as hostesses and that all of the individual plaintiffs with the exception of Bonnie Yoder have applied to defendant for maternity leave. It admits that Bonnie Yoder has been pregnant. Defendant denies the other allegations of paragraph 4, including the allegation that it has committed unlawful employment practices.

5. Defendant admits the allegations of paragraph 5 that plaintiff union is, and at all times material herein has been, the bargaining representative under the Railway Labor Act of hostesses employed by it, including the individual plaintiffs; that as such representative it has the legal duty to act impartially and fairly represent hostesses in the employ of defendant. Defendant denies the other allegations of paragraph 5.

6. Defendant admits the allegations of paragraph 6.

7. Defendant denies the allegations of paragraph 7. It alleges that since November 7, 1968, it has furnished to each of

its hostesses including the individual plaintiffs a flight service manual containing the following statement of policy:

(a) *Married Hostesses.*

> If a hostess becomes pregnant or adopts a child, she will be required to immediately resign from the Hostess Department. In such case, it will not be necessary to give two (2) weeks notice. Hostesses resigning due to the above will be credited with all accumulated vacation time for pay purposes. Hostesses desiring to continue employment with the Company may request transfer to a ground position or may request a maternity leave.

[T]hat pursuant to its policy of prohibiting a hostess from flying while pregnant, and thereafter if a child is born, defendant has terminated the employment of the individual plaintiffs. It alleges that said policy by its terms covers only female hostesses, that defendant does not presently employ males in the hostess occupation (although it does employ males in a different occupation, that of purser), and that there has been no unlawful discrimination in the termination of the individual plaintiffs. It alleges that unlike fatherhood, pregnancy is physically disabling. It alleges that said policy is based upon economic, medical and operational considerations. A hostess who is pregnant is not physically able to perform her duties in the air; a longer leave of absence for pregnancy is necessary for hostesses than in the case of most other occupations; when following pregnancy a hostess is again physically able to perform her duties in the air, she must receive lengthy and costly retraining because of equipment and procedural changes affecting her job which have taken place since her leave of absence commenced. The occupation of hostess also differs from other occupations with respect to her ability to make adequate day care arrangements for any children; her employment may require her to spend many days and nights away from home and to be, frequently for many hours at a time, in flight and unable to communicate with her family (defendant's

hostesses may fly from points in the United States to points in distant countries); to subject the mother to a job which will carry her out of communication with an infant during its formative years and when it is especially susceptible to illness will tend to create a stress which will prevent her from devoting her best efforts to the performance of her duties; the existence of stress upon a hostess defeats a primary purpose of her job—to allay fears of passengers and set their minds at ease; in the event of sickness or other emergency involving her child, a substitute hostess must be provided and special transportation arrangements made by defendant. It is not economically feasible for defendant to terminate hostesses on an individual basis who are unable to satisfactorily perform their jobs because of pregnancy or domestic responsibilities resulting from pregnancy. Defendant alleges that a similar policy is followed by other air lines and is contained in collective bargaining agreements to which plaintiff union is a party.

8. Defendant admits the allegations of paragraph 8.

9. Defendant admits the allegations of paragraph 9 that grievances have been filed by plaintiff union and by plaintiffs Pamela Dailing, Sadie Sue Lake, and Bonnie Yoder under the collective bargaining agreement between plaintiff union and defendant protesting termination of employment and that defendant has denied such grievances. Defendant alleges that these plaintiffs made an election of remedies by first pursuing the grievance procedure and are thereby precluded from maintaining this action.

10. Defendant denies the allegations of paragraph 10, except that the allegation that plaintiffs have no remedy at law except for the equitable relief prayed for is conclusory and requires no answer.

11. Defendant admits the allegations of paragraph 11, except that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 11

that on or about June 1, 1970, plaintiff union filed a charge with the EEOC alleging unfair employment practices, and that the EEOC notified plaintiff union on July 31, 1970, that it was entitled to initiate a civil action in a United States District Court.

First Affirmative Defense

12. Defendant's policy of prohibiting a hostess from flying while pregnant, and thereafter if a child is born, is based upon a "bona fide occupational qualification reasonably necessary to the normal operation" of defendant's business within the meaning of 42 U.S.C. § 2000e-2(e) and, therefore, the termination of individual plaintiffs was not an unlawful employment practice.

Second Affirmative Defense

13. To the extent that defendant's said policy prescribes different terms, conditions or privileges of employment for hostesses, to-wit, that a hostess is prohibited from flying while pregnant, and thereafter if a child is born, the same was and is included therein pursuant to "a system which measures earnings by quantity and quality of production" within the meaning of 42 U.S.C. § 2000e-2(h) and, therefore, the termination of the individual plaintiffs was not an unlawful employment practice.

Wherefore, Defendant Trans World Airlines, Inc. prays that the complaint be dismissed, that defendant be awarded its costs incurred herein, and for such other and further relief as to the Court may seem just and proper.

Gardner, Carton, Douglas, Chilgren
& Waud
By: /s/ Laurence A. Carton
/s/ Joseph P. Carr
Attorneys for Defendant
Trans World Airlines, Inc.

Admitted Rec. by USCA order 4-13-73

LETTER TO UNION CONCERNING AMENDMENT TO LABOR CONTRACT

(October 26, 1970)

Mr. J. D. Preston
President, Local 550
Air Line Stewards & Stewardesses Association
205 West Wacker Drive
Chicago, Illinois 60606

Dear Mr. Preston:

This will confirm our conversation of this date concerning the implementation of Article 15(G) of the Agreement dated October 22, 1970.

Hostesses who left the Company on or after August 1, 1969, by reason of pregnancy will be offered the opportunity to return to active service as a flight attendant provided that she notifies the Company of such intent within 30 days of receipt of the offer of reinstatement. She will be required to submit a doctor's statement if now pregnant, or a birth certificate if delivery has occurred. If delivery was six or more months prior to November 16, 1970, return to active duty must occur on or before January 1, 1971, or she shall be ineligible to do so. If delivery was within six months of November 16, 1970, the provisions of Article 15(G) will be applied.

In any event, seniority will not commence to accrue until such time as the hostess has returned to active duty. No seniority will be credited for time off as a result of this Agreement.

Any hostess returning pursuant to this letter or Article 15(G) will be required to meet the appropriate standards in effect at the time she left active duty.

Very truly yours,

T. M. Cromartie
Director
Labor Relations-Flight

cc: Miss C. Cross
Mr. G. L. Twyman

Article 15

LEAVES OF ABSENCE

(A) When the requirements of the service will permit, an employee may be granted a personal leave of absence for a period not in excess of one hundred and eighty (180) days, upon receipt by the employee's supervisor of a written request, setting out the reasons therefor. When such leave is granted, the employee shall retain, and shall continue to accrue, seniority, except for pay purposes, only during the first ninety (90) days of such period. Such leave may be extended for additional periods not to exceed ninety (90) days each, when approved in writing by the employee's supervisor, but during such extended leaves other than the first leave, seniority shall be retained but shall not continue to accrue. If the employee engages in other employment within the field of aviation without prior written permission of the Company, she or he shall be deemed to have resigned and her or his name will be removed from the seniority list.

(B) When leaves of absence are granted by the Company because of sickness or injury, an employee's seniority shall accrue, except for pay purposes, until he or she is able to return to duty or is found to be unfit for such duty, except that in no case shall leave for sickness or injury exceed a total continuous period of three (3) years. Return to duty after such leave shall be subject to a reasonable trial period not to exceed ninety (90) days. When leave of absence is granted for industrial injury, an employee's seniority shall accrue for pay purposes.

(C) An employee hereunder accepting an official position with the Association may, by mutual consent between the Company and the Association, be granted a leave of absence by the Company for a period of one (1) year, which may be extended by agreement between the Com-

pany and the Association, as long as this Association remains the exclusive bargaining agency of employees covered by this Agreement. An employee granted leave under this paragraph shall continue to accrue seniority, except for pay purposes, and shall return to duty subject to (E) of this Article.

(D) Immediately after expiration of a leave of absence granted under (A) of this Article, a Flight Attendant may exercise bidding privileges on any vacancy existing on the system. If such employee fails to become a successful bidder, she or he may displace the least senior employee in her or his status on the operation to which the returning employee was assigned immediately prior to the leave, provided that such employee is senior to the employee being displaced. If the returning employee does not displace, she or he will immediately be placed on furlough status and the provisions of Article 12 shall apply.

(E) Immediately after the expiration of a leave of absence granted under (B) or (C) of this Article, a Flight Attendant may displace the least senior employee in her or his status at the location where the returning employee was assigned immediately prior to the leave, provided that such employee is senior to the employee being displaced. If unable to so displace because of seniority, the provisions of (D) of this Article shall apply.

(F) When an employee is granted a leave of absence for extended active military duty, he or she shall retain, and continue to accrue, seniority until ninety (90) days after termination of such active duty. Return to duty with the Company from such leave shall not entitle the employee to any greater relative seniority than would have occurred had the employee not taken such military leave. As soon as possible, but in no event later than the completion of the ninety (90) day period mentioned in this paragraph,

an employee hereunder will displace the least senior employee in her or his status at the location where the returning employee was assigned immediately prior to the leave, provided that such employee is senior to the employee being displaced. If unable to so displace because of seniority, the provisions of (D) of this Article shall apply.

(G) A female employee, upon discovery that she is pregnant, shall notify the Company and upon such notice the employee will be removed from service. If the employee fails to give the Company notice as required above, the case will be handled as circumstances indicate subject to Article 16. An employee who has given notice of her pregnancy and does not wish to resign may request a maternity leave of absence for the term of the pregnancy and for a period of three (3) months immediately following delivery. To support the request for such leave, the employee will be required to submit a physician's statement verifying the pregnancy. At the end of the period described immediately above, the employee must be available to return to active flight duty unless additional leave is requested and supported by her physician's statement indicating that additional time is necessary.

In no event shall a maternity leave exceed six (6) months following delivery. Return to service shall be contingent upon successfully passing a Company physical. An employee granted a maternity leave under the provisions of this paragraph shall retain, but not accrue, seniority during such leave and shall not accrue vacation, sick leave or longevity for pay purposes and shall not be eligible for sick leave benefits for time lost as a result of pregnancy.

(H) Employees returning from leaves of absence under this Article 15, must meet the Company standards required to be met prior to the leave.

Rec. No. 31

* * (Caption No. 70 C 2071) * *

PETITION

(Filed July 16, 1971)

Now come Laurence A. Carton and Joseph P. Carr, attorneys for defendant, and petition this Court for the entry of an Order and Order to Show Cause attached hereto, and in support thereof state:

1. On August 18, 1970, Local 550 and five former hostesses of defendant filed this action against defendant under Title VII of the Civil Rights Act of 1964 ("the Act") on behalf of themselves and of other persons similarly situated who had been employed by defendant at any time since July 2, 1965, the effective date of the Act. Plaintiffs alleged that defendant had discriminated against such persons on the basis of sex in violation of the Act. They alleged that defendant had maintained a practice of terminating the employment of hostesses who became pregnant and that it had not terminated the employment of its male employees who had fathered children. The complaint sought among other things a declaration that this practice violates the Act, an injunction ordering defendant to take appropriate affirmative action as provided under the Act, and monetary relief.

2. Defendant contested the suit on a number of grounds set forth in its answer to the complaint. On February 26, 1971, plaintiffs filed a motion for summary judgment together with a brief in support thereof. On April 28, 1971, the Equal Employment Opportunity Commission filed an amicus curiae memorandum in support of the motion.

3. Thereafter settlement negotiations were begun between the parties resulting in an agreement, the terms of which are embodied in the written Agreement of Compromise and Settlement which is submitted herewith to the Court. The agreement provides a plan for reemployment of former hostesses who

were removed from the payroll of defendant between July 2, 1965, and July 31, 1969 (the effective date of an agreement between plaintiff union and defendant providing maternity leaves of absence for hostesses) because of pregnancy.

4. Defendant has denied and continues to deny the material allegations of the complaint. Defendant has concluded that the proposed settlement is fair and reasonable and merits the approval of this Court, and that it is desirable to put an end to the present controversy, without awaiting the ultimate results of the litigation, after appeals, if any, and to avoid further litigation expense.

5. Petitioners respectfully request the Court to enter the attached Order and Order to Show Cause finding that the members of the class consist of all former hostesses who were removed from the payroll of defendant between July 2, 1965, and July 31, 1969, because of pregnancy.

Wherefore, petitioners pray for the entry of the attached Order and Order to Show Cause, and that following a hearing the Court enter a further order approving the Agreement of Compromise and Settlement, and dismissing the action on the merits with prejudice.

Dated: July 14, 1971.

/s/ Laurence A. Carton
Laurence A. Carton

/s/ Joseph P. Carr
Joseph P. Carr
Attorneys for Defendant

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Rec. No. 33

* * (Caption—No. 70 C 2071) * *

ORDER AND ORDER TO SHOW CAUSE

(Entered July 16, 1971)

The parties hereto having entered into an Agreement of Compromise and Settlement ("Agreement") dated July 14, 1971, subject to the approval of the Court, and

The parties having applied to the Court for the approval of the Agreement as fair and reasonable,

Upon the Agreement dated July 14, 1971, and executed by the attorneys for plaintiffs and defendant in the above entitled action, the pleadings herein, the annexed Notice of Settlement Hearing; and upon the undersigned consent of the attorneys for all parties appearing in the action; and it appearing that the proposed settlement embodied in the Agreement may be a fair and reasonable one and that a hearing should be held to determine whether the same should be approved by the Court, it is hereby

A. Ordered, that the above entitled action is properly maintainable as a class action and that the members of the class consist of all former hostesses who were removed from the payroll of defendant between July 2, 1965, and July 31, 1969, because of pregnancy; and it is

B. Further ordered, that a hearing be held before the undersigned in the Courtroom of Judge Joseph Sam Perry of the United States District Court, Northern District of Illinois, Eastern Division located in Chicago, Illinois, on August 30, 1971, at 1:30 P.M. Central Daylight Time for the purpose of determining whether the Agreement is fair and adequate and should be approved; and it is

C. Further ordered, that notice shall be given by plaintiff union publishing in its newspaper a copy of the annexed Notice

of Settlement Hearing, the publication to be not less than 30 days before the hearing, and that such notice shall constitute the best notice practicable to the members of the class and shall constitute due and sufficient notice of said hearing to each member of the class and that the parties shall, on or before the date of such hearing file in this Court proof of publication in accordance herewith; and it is

D. Further ordered, that at the aforesaid hearing to be held on August 30, 1971, each member of the class show cause why (1) the aforesaid Agreement should not be approved by the Court, and (2) final judgment should not be entered thereon.

Dated:

Jul 16 1971
/s/ J. S. Perry

The undersigned hereby consent to the entry of the foregoing Order.

/s/ Laurence A. Carton
Laurence A. Carton

/s/ Joseph P. Carr
Joseph P. Carr

/s/ Gilbert Feldman
Gilbert Feldman

/s/ Barbara J. Hillman
Barbara J. Hillman

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Rec. No. 32

* * (Caption—No. 70 C 2071) * *

AGREEMENT OF COMPROMISE AND SETTLEMENT

(Filed July 16, 1971)

Whereas, on August 18, 1970, plaintiffs commenced this action on behalf of certain former hostesses who were removed from the payroll of defendant because of pregnancy;

Whereas, defendant has appeared in said action, has denied the material allegations of the complaint by answer, has asserted various affirmative defenses, and has asked that the complaint be dismissed;

Whereas, plaintiffs, while maintaining that the allegations of the complaint would be sustained upon trial, recognize that the pending action involves sharply contested issues of fact and law, that the resolution of these issues and the ultimate results of the litigation after appeals, if any, cannot be predicted, and that the relief provided in attached proposed memorandum of understanding ("Settlement") is substantial; and have concluded that this action should be settled and terminated by appropriate process of this Court in order that members of the class entitled to relief might receive it with a minimum of delay;

Whereas, defendant, while denying the material allegations of the complaint, has entered into this Agreement of Compromise and Settlement ("Agreement") because of its conclusion that the proposed Settlement is fair and reasonable and that it is desirable to put an end to the present controversy, without awaiting the ultimate results of the litigation, after appeals, if any, in order to avoid further expenses, inconvenience and the distraction of burdensome and protracted litigation;

Whereas, the purpose of this Agreement is to dispose of and settle all claims or causes of action alleged or which could have been alleged in the complaint and all claims or causes of action

arising or which may arise out of, under, or in connection with any matter or transaction referred to or suggested by the complaint in said action;

Whereas, the plaintiffs and the defendant have concluded that the terms of the Settlement are fair, reasonable and adequate for all of the parties and all persons on whose behalf the action is maintained, and that the Settlement merits the approval of the Court;

Now, therefore, it is agreed:

1. Plaintiffs and the defendant hereto agree that defendant's acceptance of this Agreement is not and shall not be construed as an admission by it or deemed to be evidence of the validity of any of plaintiffs' claims herein or its liability for any thereof or of any unlawful acts by it whatsoever nor shall this Agreement or any of the terms hereof be offered or received in evidence in any civil or administrative action or proceeding as an admission of wrongdoing on the part of the defendant. The defendant expressly disclaims any liability under the complaint herein and states that it is entering into this Agreement to avoid further expenses, inconvenience and the distraction of burdensome and protracted litigation.

2. The Settlement shall become effective when the Final Judgment approving this Agreement becomes effective. For purposes of this Agreement the Final Judgment becomes effective if no notice of appeal therefrom is filed with the Clerk of this Court within 30 days of the date of the entry of the Final Judgment.

3. Upon the filing of this Agreement, an Order will be entered as follows:

(a) That the within action is properly maintainable as a class action and that the members of the class consist of all former hostesses who were removed from the payroll of defendant between July 2, 1965, and July 31, 1969, because of pregnancy.

(b) That a hearing be held by the Court in the Courtroom of Judge Joseph Sam Perry of the United States District Court, Northern District of Illinois, Eastern Division in Chicago, Illinois, on such date as the Court may direct, for the purpose of determining whether this Agreement is fair and adequate and should be approved and a Final Judgment entered thereon;

(c) That plaintiff union give notice of said hearing by publishing in its newspaper a copy of the Notice of Settlement Hearing, and that such notice shall constitute due and sufficient notice of said hearing to all of the members of the class and the parties shall, on or before the date of such hearing, file in this Court proof of publication in accordance herewith.

4. At the conclusion of the hearing upon the Order to Show Cause as specified in paragraph 3 hereinabove, an order shall be entered setting forth the findings of the Court as to the fairness, adequacy and propriety of this Agreement and ordering that Final Judgment be entered in accordance with this Agreement, or, if the findings so require, that this Agreement be vacated and declared null and void and the case restored to the status quo.

5. Upon the approval by the Court of this Agreement in accordance herewith, the plaintiffs consent that a Final Judgment be entered by the Court as follows:

(a) That the parties hereto perform the acts called for by this Agreement; and

(b) That all claims or causes of actions alleged or which could have been alleged in the complaint and all claims or causes of actions arising or which may arise out of, under, or in connection with any matter or transaction referred to or suggested by the complaint be dismissed as against the

defendant on the merits and with prejudice and without costs to any party.

6. All parties hereto expressly waive the right to appeal from any judgment of the Court which is consistent with this Agreement.

7. Should this Agreement not be approved by the Court or Final Judgment not entered thereon in accordance with the terms hereof, then this Agreement shall become null and void.

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Dated: July 14, 1971

MEMORANDUM OF UNDERSTANDING

Any former hostess who was removed from the payroll of Trans World Airlines, Inc. ("the Company") between July 2, 1965 and July 31, 1969 because of pregnancy shall be eligible for re-employment as a hostess under the following conditions:

1. Any such former hostess shall be placed on a preferential hiring list if she gives the Manager-Flight Attendant Planning and Administration, 605 Third Avenue, New York, New York, written notice of her desire to be re-employed as a hostess within sixty (60) days of entry of an order by the United States District Court for the Northern District of Illinois, Eastern Division approving this Memorandum of Understanding. Such notice of intent to return shall also list her perference for domicile, if any, and if more than one domicile is acceptable, she shall list the domiciles in order of her preference. The Company shall have no liability whatsoever to any such former hostess who fails to timely provide such notice.

2. Such former hostess will be allowed all seniority accrued as a hostess prior to her date of termination. Seniority shall begin to reaccrue on the date of her re-employment by the Company.

3. For purposes of offering re-employment, the preferential hiring list prepared pursuant to Paragraph 1 hereof shall, upon expiration of the sixty (60) day period specified in said Paragraph 1, be considered the standing bid of such hostesses. As vacancies occur, they will be awarded in system seniority order, to those hostesses having bids on file, prior to hiring any other person to fill such vacancies.

4. Notice of re-employment as described in Paragraph 3 above, shall be sent by certified mail to the address specified in the notice referred to in Paragraph 1 hereof, or to any different address subsequently furnished to the Company in writing. A former hostess whose name is on

the preferential hiring list shall not be entitled to preference in re-employment and shall forfeit her seniority with the Company and the Company shall have no liability whatsoever to such former hostess if she does not signify her intention to accept re-employment within ten (10) days after the date of the notice, and if she does not return to the service of the Company as a hostess on the date specified in the notice offering re-employment, which date shall not be less than fifteen (15) days after the date of such notice.

5. As a condition of re-employment, pursuant to Paragraph 4 hereof, such former hostess shall be required to pass a Company medical examination and to meet the Company's hostess qualifications as they existed on the date of her termination, including the prescribed weight standards.

6. If, on the date established for re-employment, such former hostess is pregnant, she shall be placed on a maternity leave of absence pursuant to the appropriate provisions of the TWA/ALSSA Working Agreement signed October 22, 1970. In such event seniority shall not begin to reaccrue until she returns from such maternity leave of absence.

Signed this 9th day of August, 1971

For Trans World Airlines, Inc.
/s/ David I. Crombie
Vice President, Industrial Relations
For Air Line Stewards and Stewardesses
Association
/s/ James F. Horst
International Executive Vice President

AIR LINES STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, et al., Plaintiffs-Appellees, and Equal Employment Opportunity Commission, Applicant for Intervention-Appellant,

v.

AMERICAN AIRLINES, INC., and Trans World Airlines, Inc., Defendants-Appellees.

Nos. 71-1614, 71-1615.

United States Court of Appeals.

Seventh Circuit.

January 18, 1972.

Before CUMMINGS, PELL, and STEVENS*, Circuit Judges.

CUMMINGS, Circuit Judge.

In these two class actions, the Union[1] and certain former stewardesses asserted that both defendant airlines had violated Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) by terminating stewardesses who had become pregnant. They sought reinstatement, back pay, and other relief. On June 1, 1970, the Union filed appropriate charges with the Equal Employment Opportunity Commission, and a month thereafter the Commission notified the Union that it was entitled to initiate civil actions in the district court in accordance with 42 U.S.C. § 2000e-5(e) and (f). These suits were filed a fortnight thereafter.

Although the district court initially refused to permit the Commission to participate as amicus curiae, in March 1971 it

* On the day following the oral argument, a fact which Judge Stevens deemed disqualifying came to his attention; he did not thereafter participate in this case.

[1] Airlines Stewards and Stewardesses Association, Local 550.

was granted leave to file an amicus brief in support of plaintiffs' motion for summary judgment and did so on April 30, 1971.

After our decision in Sprogis v. United Airlines, 444 F.2d 1194 (7th Cir. 1971), certiorari denied, 404 U.S. 991, 92 S.Ct. 536, 30 L.Ed.2d 543 the parties entered into settlement negotiations resulting in July 14, 1971, memoranda of understanding. The two airlines agreed to place pregnancy-discharged stewardesses on a hiring list according to their seniority at the time of discharge (plus 90 days in the American Airlines case). Upon the occurrence of a vacancy, a stewardess would have ten days to accept reemployment on condition that she meet weight restrictions and other qualifications in effect at the time of her discharge. As the Commission notes, the proposed settlement did not entitle the stewardesses to immediate, unconditional reinstatement, full seniority from time of first hire, and back pay from date of discharge.

At a hearing on July 16, 1971, the district court entered orders permitting the suits to proceed as class actions, and permitting notice of the proposed settlement and an August 30, 1971, hearing thereon to be given to the stewardesses' class by publication in the union newspaper. A copy of the notice was also mailed to each stewardess at her last known address. On August 18 and 19, 1971, the airlines mailed copies of the proposed settlement to members of the class.

On August 5, 1971, the Commission sought to intervene as of right in both suits under Rule 24(a) of the Federal Rules of Civil Procedure. However, the motions to intervene were denied on August 11, 1971, on the ground that

> "These parties have always been fairly represented, they have been represented by competent counsel."

Thereupon the Commission appealed, and on August 25, we granted a stay pending resolution of the consolidated appeals.

[1] Rule 24(a) of the Federal Rules of Civil Procedure governs intervention of right. Clause 1 of that Rule permits

intervention when a statute of the United States confers an unconditional right to intervene. No such statute has yet been enacted as to the Commission[2]. Significantly, 3B Moore's Federal Practice ¶ 24.06[2] p. 24-94 (2d ed. 1969), notes that Congress has allowed the United States to intervene in various types of proceedings under the Civil Rights Act of 1964, but nothing is said about Commission intervention.

Clause 2 of Rule 24(a) also permits intervention of right "[1] when the applicant claims an interest relating to the property or transaction which is the subject of the action and [2] he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, [3] unless the applicant's interest is adequately represented by the interested parties." These three conditions have not been met.[3]

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[2] Upon his certification that the case is of general importance, the Attorney General is permitted to intervene as of right when a district court action has been commenced seeking relief from the denial of equal protection of the laws under the Fourteenth Amendment on account of race, color, religion, or national origin. Section 902 (42 U.S.C. § 2000h-2).

[3] Appearing to recognize that the entire thrust of Title VII's procedural scheme militates against allowing the Commission are right to control the course of Title VII litigation, the Commission makes alternative arguments for "authority" to intervene where it meets the requirements of Rule 24(a)(2). On the basis of such cases as Securities and Exchange Comm. v. United States Realty & Improvement Co., 310 U.S. 434, 458-459, 60 S.Ct. 1044, 84 L.Ed. 1293; United States v. American Trucking Ass'ns. 310 U.S. 534, 541, 60 S.Ct. 1059, 84 L.Ed. 1345; All American Airways v. Village of Cedarhurst, 201 F.2d 273, 274-275 (2d Cir. 1952); West India Fruit & Steamship Co. v. Seatrain Lines, Inc., 170 F.2d 775 (2d Cir. 1948); and Teamsters Union, Local 542 v. Ace Enterprises, Inc., 332 F.Supp. 33, 38 (N.D.Cal. 1971), the Commission argues that as a federal agency it has inherent authority to intervene which can only be negated by an express statutory provision to the contrary. Alternatively the Commission relies for its authority to intervene on 42 U.S.C. § 2000h-3, which provides:

I. The Commission's Interest in the Subject Matter of the Action and Practical Impairment of its Interests.

In an attempt to satisfy the first condition, the Commission asserts that its interest in these cases is predicated on Section 706(i) of the Act, which provides:

> "In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under subsection (e) of this section, the Commission may commence proceedings to compel compliance with such order." (42 U.S.C. § 2000e-5(i)).

Under this Section the Commission claims an interest both as the government agency empowered by Congress to enforce court orders and as the representative of the class on whose behalf these suits were brought. The Commission characterizes its interest as that of monitoring remedies in private Title VII cases to make certain that they vindicate the policies of the Act and afford appropriate relief. If this were the actual nature of the Commission's interest, it might be sufficiently related to a judicial proceeding approving a consent decree to justify intervention. However, the Commission's self-characterization is overstated.

Clearly Section 706(i) empowers the Commission to initiate court proceedings to compel compliance only when (1) a court order, coercive or consensual, has issued and (2) the subject of

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"Nothing in this Act shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General or of the United States or any agency or officer thereof under existing law to institute or intervene in any action or proceeding."

However, we do not resolve this controversy in terms of "authority" to intervene, for the Commission has not satisfied the conditions for intervention in Rule 24(a)(2). But see Braddy v. Southern Bell Telephone & Telegraph Co., No. 71-2172 (5th Cir., decided January 11, 1972), where the Commission was found devoid of such authority.

that order has failed to obey it.[4] This provision does not, as the Commission contends, charge it with responsibility in fashioning relief as opposed to determining the existence of a violation, and it does not "authorize[d] its participation in *all* suits brought by private individuals upon the entry of judgment in their favor." (Emphasis in Commission's main brief.)

When Congress provided for the intrusion of the Commission in Section 706(i), it did not make a dichotomy between establishing the underlying offense, from which the Commission was deliberately excluded,[5] and fashioning complainants' remedies. Here the Commission asserts that the proposed settlement violates the Act and that it affords narrower relief than would be awarded upon successful litigation.[6] This is simply the Commission's subjective assertion that conduct that will be permitted to the defendants is conduct violative of Title VII. Plainly the Commission cannot bring suit to establish that contention.[7] Since relief is always tailored to remedy the

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[4] See Note, Developments in the Law; Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L.Rev. 1109, 1236, 1248-1249 (1971).

[5] The Senate stripped the Commission of authority to bring suit in its own right after the House Committee on the Judiciary had divested it of its coercive enforcement powers. See Miller v. International Paper Co., 408 F.2d 283, 286 (5th Cir. 1969); Vass, Title VII: Legislative History, 7 B.C.Ind. & Com.L.Rev. 431, 450-452 (1966); Note, *supra* note 4, at 1196-1197 n. 8. An authority on the legislative history of Title VII had stated that when the Mansfield-Dirksen amendment stripped the Commission of its ability to initiate suit, the Commission was given power to recommend matters it felt deserved government action or intervention to the Attorney General and to advise and assist the Attorney General on such matters (42 U.S.C. § 2000e-4(f) (6)) as the *quid pro quo* to satisfy Congressional advocates of a "strong" EEOC with enforcement powers. Vass, *supra*, at 451-452.

[6] The Commission also complains that the settlement notice given to the members of the class was inadequate. See text *infra*.

[7] See 42 U.S.C. §§ 2000e-4(f), 2000e-5.

conduct found offensive, dissatisfaction with the court's appraisal of the conduct can always be articulated in terms of inadequacy of the relief afforded. Consequently, without subverting the manifest intent of Congress that only private litigants and the Attorney General may sue to establish an unfair employment practice,[8] we cannot accept the notion that Congress meant to invest in this Commission a participating interest in formulating Title VII remedies. Braddy v. Southern Bell Telephone & Telegraph Co., No. 71-2172 (5th Cir., decided January 11, 1972). Indeed, Section 706(i) embodies the judgment that Commission action against non-compliance with court orders will promote more scrupulous obedience, ensure against intimidation of successful plaintiffs' attempts to enforce court orders, and relieve private plaintiffs of the burden of a second action to secure the relief to which a first action found them entitled.

Section 706(i) does not authorize Commission participation in all suits as soon as judgment is rendered for plaintiffs. Simply stated, the interest afforded under Section 706(i) is the limited one of the ability to initiate contempt proceedings upon the defendant's failure to comply with the order of the trial court.[9] Failure to comply with the court's decree is the condition for Commission action under Section 706(i). Contumacious behavior is not something that can readily be assumed. Therefore, the Commission's legitimate interest under Section 706(i) is contingent and not direct, as required by Rule 24(a)(2). See Hobson v. Hansen, 41 F.R.D. 18, 24 (D.D.C.1968); 3B Moore's Federal Practice ¶ 24.09-1 [2] at 24-301 (2d ed. 1969).

What limited interest the Commission has under Section 706(i) is not practically impaired within Rule 24(a) (2) by

[8] See 42 U.S.C. §§ 2000e-5(e), 2000e-6(a); Note *supra* note 4 at 1196-1197, 1228.

[9] See Note *supra* note 4 at 1236, 1249; see also Equal Employment Opportunity Commission v. United Ass'n of J. & A. of Plumbing, Etc., 438 F.2d 408, 414 (6th Cir. 1971).

denying it rightful intervention. The Commission argues that without intervention it will find itself on the horns of a dilemma: it will be forced to choose between refusing to enforce a defective court order and enforcing an order which does not carry out the policies of the Act. However, we perceive no such dilemma. By the express terms of the statute the Commission simply cannot seek to enforce an order, defective or otherwise, unless it is disobeyed. The Commission's interest is in ensuring *compliance* with court orders, and that interest is not impaired by disallowing intervention in court proceedings to determine liability or award relief.

In its reply brief the Commission argues that an interest sufficient for intervention under Rule 24(a)(2) also emanates from Section 706(a) of the Act (42 U.S.C. § 2000e-5(a)) which requires the Commission upon a finding of reasonable cause to believe the Act is being violated, to "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." The Commission further contends its interest in effective conciliation will be impaired by the *"stare decisis"* effect of a defective court order. First, the Commission does not have sufficient interest in the success of the conciliation negotiations in its own right to justify intervention. The real party in interest in conciliation endeavors is the employee alleged to have been discriminatorily treated. He is completely free to accept or reject the proposals of union or employer as well as the position taken by the Commission.[10] Second, even if we were to assume the Commission itself had a cognizable interest, the effect of what the Commission believes to be an erroneous court order cannot be said to impair significantly its negotiating position. While under the 1966 amendment of Rule 24 "*stare decisis* principles *may in some cases* supply the practical disadvantage that warrants intervention as of right" (Nuesse v. Camp, 128

[10] Cox v. United States Gypsum Co., 284 F.Supp. 74, 83-84 (N.D.Ind.1968), affirmed, 409 F.2d 289, 291 (7th Cir. 1969).

U.S.App. D.C. 172, 385 F.2d 694, 702 (D.C. Cir. 1967) (emphasis added); see Atlantis Development Corp. v. United States, 379 F.2d 819, 828-829 (5th Cir. 1967)), the possible effect of a consent decree on the Commission's future negotiating position is insufficient to constitute practical impairment within Rule 24(a)(2). The Commission is of course free to take a more stringent position in any future conciliation negotiations than that agreed upon by parties in previous litigation and approved in a consent decree. The recalcitrance of employers and unions based upon the decree of a single district court is speculative at best in view of the fact that the aggrieved employees are always able to bring suit. By comparison to the direct practical effect of a decision of one court on the intervenor's ability finally to prevail in another court present in *Nuesse* and *Atlantis, supra,* the possible influence of a court decision on negotiations whose result is not determinative of an issue is weak indeed.[11] Hence even assuming a cognizable interest, we cannot find a practical impairment which satisfies the second condition of Rule 24(a)(2). Cf. Edmundsen v. State of Nebraska, 383 F.2d 123, 127 (8th Cir. 1967); 3B Moore's Federal Practice ¶ 24.09-1 [3] at 24-314.

[11] In asserting that the consent decree will impede its conciliatory efforts in future cases, the Commission does not complain about the impairment technically worked by *stare decisis.* That principle is one of *judicial* respect for prior court resolutions of an issue, and the Commission's complaint is about the possible adverse influence on private parties' willingness to accede to its views in negotiations. A court cannot appraise this influence on private parties in the same way as it can assess the weight a court is likely to give a prior judicial decision. See Atlantis Development Corp. v. United States, 379 F.2d 818, 828-829 (5th Cir. 1967). The former must remain more conjectural. Moreover, *stare decisis* effect has not been generally held to be a sufficient impairment of interest. In *Atlantis,* and to a lesser extent in Nuesse v. Camp, 385 F.2d 694, 702 (D.C.Cir. 1967), there was a peculiar formidable difficulty which *stare decisis* would have worked under the circumstances. At best, the Commission has not asserted a comparable impairment.

II. The Adequacy of the Representation of the Commission's Interest.

The final condition of Rule 24(a)(2) for intervention as of right is that the applicant's interest is not adequately represented by existing parties. Insofar as the Commission purports to represent the interests of the class of stewardesses, the district court concluded, and we think legitimately, that the parties were all fairly represented by competent counsel. The involvement of the stewardesses' own counsel justifies the assumption that their interests were adequately protected in the settlement agreement, even if the Commission's views differ.[12]

Insofar as the Commission purports to represent the public interest generally, the scheme of Title VII shows a legislative judgment that the public weal in such litigation was to be directly represented by the private suitor and, in some cases, by the Attorney General. By placing primary enforcement responsibility in the hands of the private litigant, specifically endowing his action with public interest characteristics,[13] Congress largely equated the public interest in this kind of litigation with the efforts private parties are willing to expend to vindicate their Title VII rights.[14] See Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 401, 88 S.C. 964, 19 L.Ed.2d 1263. When the general societal interests cannot be adequately represented by private suitors, the Attorney General may seek to intervene in private suits or file a pattern and practice suit (42 U.S.C. §§ 2000e-5(e) and 2000e-6(a)), and the Commission may refer matters to the Justice Department with such recommenda-

[12] See Note, *supra* note 4 at 1250.

[13] See *id.* at 1197.

[14] Even when a private party has not filed a charge and the Commission discovers discriminatory practices on its own and starts conciliation proceedings through the device of the Commissioner charge (42 U.S.C. § 2000e-5(a)), it cannot bring suit, but must either find a private party who will file a complaint or persuade the Attorney General to take action. 42 U.S.C. §§ 2000e-5(a), 2000e-4(f)(6). See Note, *supra* note 4 at 1238.

tion (42 U.S.C. § 2000e-4(f)(6)).[15] But the structure of Title VII is the unmistakable product of Congressional judgment that absent the participation of the Attorney General, the public interest is served by leaving the conduct of litigation to vindicate Title VII rights exclusively in the hands of private suitors.[16] Intervention as of right would substantially diminish the rights of the original parties to control the litigation. 3B Moore's Federal Practice ¶ 24.09-1[i] at 24-285.

> "Although [the Commission] is entrusted with important and sensitive responsibilities of investigation and conciliation, it was not intended by Congress to pre-empt the ultimate rights of the claimant, the person the Act was designed to protect." Fekete v. United States Steel Corp., 424 F.2d 331, 336 (3d Cir. 1970).

Thus the public interest the Commission claims generally to represent is adequately served, by force of legislative judgment, through the efforts of private litigants in these actions under the vigilant protection of the court.[17] Where the Commission asserts interests peculiar to its specific public responsibility

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[15] See note 5 *supra*. We were advised at the oral argument that the Commission did not recommend the Attorney General's intervention in these two cases, and he has not intervened. United States v. United Brotherhood of Carpenters and Joiners of America, Local 169, 457 F.2d 210 (7th Cir. No. 71-1389, decided January 4, 1972).

[16] See Note, *supra* note 4 at 1239.

[17] Because of the unsophisticated character of many Title VII plaintiffs and because of the possibilities of less than diligent efforts by some representative plaintiffs, the courts have a weighty responsibility in the public interest to interpret meaningfully the technical provisions of the Act and assure that conduct and results of the litigation are fair to all aggrieved members of the plaintiff class. See Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1201 (7th Cir. 1971), certiorari denied, 404 U.S. 991, 92 S.Ct. 536, 30 L.Ed.2d 543; Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 428-429 (8th Cir. 1970); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 715 (7th Cir. 1969).

roles, but interests insufficient to justify intervention as of right, possibly it may seek permissive intervention under Rule 24(b) or it may seek leave to appear as amicus curiae.[18]

Whether it was wise or improvident in the public interest to exclude the Commission from control of the litigation is not our concern. However, the claims the Commission makes here do not exemplify improvidence. Toward this end we have examined the Commission's claims even though the Commission is not actually entitled to raise them.

The Commission claims that the settlement notice was incomplete and misleading. Rule 23(e) of the Federal Rules of Civil Procedure requires that notice be given to the members of a class before their action is dismissed or compromised. The notice required by the Rule must fairly apprise the members of the class of the proposed compromise and of the options open to dissenting class members in connection with the proceedings. Philadelphia Housing Auth. v. American Radiator & Standard Sanitary Corp., 323 F.Supp. 364, 378 (E.D.Pa.1970); see Advisory Committee's Note on the Proposed Rules of Civil Procedure, 39 F.R.D. 69, 107 (1966). Here the notice of the settlement hearing on the Agreement of Compromise and Settlement was published in the Union newspaper more than thirty days before the hearing. The Union mailed a copy of the notice to the 72 members of the class it had listed more than thirty days before the hearing, and the defendants respectively mailed a copy of the notice to all members of their plaintiff classes thirty days and three weeks before the hearing. The notice summarized the proceedings to date, informed the class members of the significance of judicial approval of the proposed agreement, told the class members that the agreement provided for their being placed on a "preferential hiring list"

[18] See Note, *supra* note 4 at 1239. According to the airlines' brief, the parties do not object to the Commission's appearing amicus curiae in these cases.

subject to their acceptance, and informed would-be dissenters that they might appear in person or by counsel to register their objections and present evidence in support thereof. When the memoranda of understanding were finalized, all class members were mailed a copy of the proposed agreements approximately ten days before the hearing date.

While the Commission has suggested that the manner of communicating the information and its content could have been improved, we conclude that the notice sufficiently conveyed the required information and afforded a reasonable time for those interested to make their appearance with due regard to the practicalities and peculiarities of the case, thus satisfying the demands of due process. Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 313-314, 70 S.Ct. 652, 94 L.Ed. 865.

Additionally, the Commission attacks the weight restrictions in the settlement agreements as violative of Title VII. However, weight restrictions have not been put in issue in these lawsuits. Their validity is being resolved in litigation elsewhere.[19] We agree with the Union that this pregnancy class should not be barred reemployment under the settlement negotiations while the weight question is still unresolved. In fact, the Commission's effort to defeat these settlements because of the weight restrictions supports the denial of intervention below. Cf. United States v. Automobile Manufacturers Ass'n, 307 F.Supp. 617, 619-620 (C.D.Cal.1969), affirmed, 397 U.S. 248, 90 S.Ct. 1105, 25 L.Ed.2d 280.

Finally, the Commission asserts that the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated. This is precisely the sort of gratuitous opinion that the parties are entitled not to have foisted upon them under the scheme of Title VII. Suffice it

[19] See Maguire et al. v. Trans World Airlines, 70 Civ. 3947 (S.D.N.Y.).

to say that as a general proposition the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation. This is especially true within the confines of Title VII where "there is great emphasis * * * on private settlement and the elimination of unfair practices without litigation." Oatis v. Crown Zellerbach Corp., 398 F. 2d 496, 498 (5th Cir. 1968). See Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969).

The orders of the district court denying the Commission's motion to intervene of right are affirmed, our stay order of August 25, 1971, is dissolved, and both causes are remanded for further consideration.

* * (Caption—Nos. 70 C 2069, 70 C 2071) * *

Report of proceedings had in the above-entitled cause before the Honorable J. Sam Perry, Senior Judge of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, March 10, 1972, commencing at two o'clock p.m.

Present:

Messrs. Kleiman, Cornfield & Feldman (10 South La Salle Street, Suite 452, Chicago, Illinois 60603), by Mr. Gilbert Feldman, appeared for the plaintiffs;

[2] Messrs. Gardner, Carton, Douglas, Chilgren & Waud (One First National Plaza, Chicago, Illinois 60670), by Mr. Laurence A. Carton and Mr. Joseph P. Carr, appeared for the defendants;

Messrs. Bell, Boyd, Lloyd, Haddad & Burns (135 South La Salle Street, Chicago, Illinois 60603), by Mr. D. Sidney Condit, appeared for respondent Kathryn Kridel;

Messrs. Pressman & Hartunian (134 North La Salle Street, Chicago, Illinois 60602), by Mr. Charles Pressman, and Mr. Arnold I. Shure (11 South La Salle Street, Room 2700, Chicago, Illinois 60603), appeared for respondent Ann B. Zipes;

Messrs. Mintz, Raskin & Lewis (100 North La Salle Street, Suite 2510, Chicago, Illinois 60602), by Mr. Robert A. Romanoff and Mr. Mahendra R. Mehta (188 West Randolph Street, Suite 1325, Chicago, Illinois 60601), appeared for respondent Kathy Comer;

[3] Messrs. Steinberg, Polacek & Steinberg (33 North La Salle Street, 34th Floor, Chicago, Illinois 60602), by Mr. Bradley D. Steinberg, and Messrs. Bailis & Hoyt (221 North La Salle, Suite 1063, Chicago, Illinois 60601), by Mr. Ronald S. Bailis, appeared for respondent Darlene Preston and certain other named plaintiffs in case Number 72 C 498;

Messrs. Anderson, Letlund & Tockman (619 South Bonnie Brae, Los Angeles, California), by Mr. Earl Tockman, appeared for respondents Bonnie Pulskamp, Susan Prasciunas, Marcia Jimerson, Phyllis Dill, Elizabeth Korengold, and Carol Rossi;

Mr. Matthew L. Salita (69 West Washington Street, Suite 2828, Chicago, Illinois 60602), appeared for respondent Bonita Ray White;

Mr. Irving M. Miller and Mr. John I. Goemaat (219 South Dearborn, Room 1836, Chicago, Illinois 60604), appeared amicus curiae for the Equal Employment Opportunity Commission.

[4] The Clerk: 70 C 2069, Airline Stewardesses versus American Airlines, et al., for a hearing.

Mr. Feldman: Good afternoon, your Honor.

Mr. Shure: With that, your Honor, I believe there is a consolidated case. Is it consolidated?

Mr. Feldman: Yes, your Honor, the cases are consolidated.

Mr. Shure: The other case is Airline Stewardesses, et al., versus Trans World Airlines.

The Court: Mr. Clerk, call it also for the record, consolidated with.

The Clerk: 70 C 2071, Airline Stewardesses versus Trans World Airlines, Inc.

* * * *

PATRICIA A. SANTINI, called as a witness on behalf of the objecting plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Pressman

Q. Would you state your name, address, and age?

A. My name is Patricia A. Santini. I live at 16 Strawberry Circle, Mill Valley, California, [112] and my age is thirty.

Q. Are you married?

A. Yes, sir.

Q. Your husband's name?

A. Robert Allen.

Q. Do you have any children?

A. Two.

Q. What are their names and ages?

A. David, he's two and three-fourths years of age; and Jeffrey, which is a year and a half.

Q. Are you a named plaintiff in this case?

A. Yes, I am.

Q. Were you employed by TWA?

A. Yes, I was.

Q. When did you commence your employment with TWA?

A. June 11 of 1962.

Q. When were you married?

A. June 16, 1967 and June 20, 1967; we were married twice.

Q. When did you leave the employ of TWA?

A. December 11, 1968.

Q. What were the circumstances of your leaving that employ?

[113] A. Pregnancy, I was forced to submit my resignation to the company because I was pregnant.

Q. Tell the Court how that happened, please. Did you do it by note, verbally, or what?

The Court: He wants to know how did your discharge take place?

The Witness: I sent the company a letter stating to them that due to the company policy, I was to be terminated because of pregnancy.

By Mr. Pressman:

Q. Was there a response to that?

A. Well, I received a black and white typewritten letter from the company which coldly told me I was terminated. I received no verbal recognition from them whatsoever.

Q. In your work with TWA, had you received any awards?

A. Yes, and they have a yearly hostess of the month contest between the girls,—

Mr. Feldman: Your Honor, I object.

The Court: Will counsel stipulate to her qualifications?

Mr. Feldman: Let's stipulate they are all excellent stewardesses in one way or another.

[114] The Court: That is not in issue. We presume each one of them, unless it is to the contrary shown, are all qualified.

Mr. Pressman: Your Honor, it could be an issue in determining whether they may be entitled to seniority, back pay and all that sort of thing, in bargaining. That is the only reason I bring it up.

Can I offer these? Mark them and offer them?

The Court: Mark them as a group exhibit and they will be admitted.

Mr. Pressman: Could you?

(The documents were thereupon marked Respondent Santini Group Exhibit A for identification.)

The Court: You may proceed.

By Mr. Pressman:

Q. Were you employed following your termination with TWA?

A. No.

The Court: Did you seek reemployment from them?

The Witness: Yes, sir.

[115] The Court: You were refused?

The Witness: Yes, sir.

The Court: Did you seek reemployment from other airlines?

The Witness: I am not interested in other airlines.

The Court: You did not, then?

The Witness: No.

By Mr. Pressman:

Q. How many times did you seek employment with TWA?

A. In January I went to the unemployment office in San Francisco and filed an application, and then the baby was born. Then shortly after the baby was born, I went back in November and December and was once again told there was no openings or positions available.

In the meantime, I was making phone calls to the airport to see what was available.

Q. Did you also apply for a job on the ground?

A. Yes.

Q. Did they reject you for that?

A. I never heard anything from them.

Q. But you filled out an application?

[116] A. Right.

• • • •

[219]

Cross Examination by Mr. Feldman of Darlene Preston:

Q. Before sending those documents out, or since, I want to know whether you or your lawyers have evaluated this question: The Company may raise the question if individual cases are heard with respect to those stewardesses who were terminated much before you as to whether or not the statute of limitations bars their right to this Court, and if—

Mr. Salita: I would object on the basis that she does not know—

The Court: Let him finish his question. I do not know what his question is yet.

By Mr. Feldman:

Q. There is a possibility that hasn't been ruled upon by the Court, that those people who did not within ninety days do anything might not be entitled to relief in this court if the settlement agreement [220] is not accepted.

Now, have you considered that possibility in terms of evaluating this situation?

A. No.

Q. Have your lawyers brought that possibility to your attention?

Mr. Salita: Just a moment. I would like to lodge an objection on the basis that he asked her how she felt, and if her lawyers knew this.

The Court: Well, not if they knew it, but if they called it to her attention.

Mr. Salita: Fine. I would ask that that portion of the question be stricken.

The Court: No, so far as if they knew it is concerned, but if they called it to her attention, or if it was discussed with her and whether she took it into consideration, she may answer. She may answer whether it has been taken into consideration by her.

Mr. Bailis: Your Honor, we would like to object also with respect to conversations between counsel and Miss Preston regarding it.

The Court: You open it up and waive it when you come in here specially and make your objections and enter an appearance, for the purpose [221] here, and want to open up her prior counsel's conversations. There has been no question about waiving conversations between her and Mr. Feldman when he was her attorney. She has waived all that right by coming in here under the circumstances.

Overruled.

Mr. Bailis: Your Honor, I believe that—

The Court: I have overruled on it, and let's do not waste any time. I have ruled on it, and let's have the answer to the question. It is very material, whether she knows all of these facts or not, and whether they were brought to her attention. It's important for me to know about it.

By the Witness:

A. No. Well, for all this time that I have been contacting the girls and mailing out those affidavits I didn't feel that I had any legal representation.

By Mr. Feldman:

Q. So, is the answer that you did not know that this was a fact that should be taken into consideration?

A. No, I did not know.

[222] Mr. Pressman: Excuse me just a moment. I would like to register an objection because it is based upon the assumption that this is indeed a factor that should have been taken into consideration. This is a matter of expert testimony.

The Court: That is a matter for me to find, and I think he has the right to inquire about it. It is whether or not this is a fair settlement, whether or not a full consideration has been given as to whether or not it should be accepted, and what the risks are, whether or not she knows all those risks. That is something to be gone into.

Objection overruled. The answer may stand.

* * * *

[288]

Cross-Examination by Mr. Pressman of Mr. Feldman

What it ultimately led to [289] was the two letters you have, one to American and one to TWA, being sent out. They were

sent out to some other carriers, too, in order to indicate what our position was to the companies and see if the matter could be rectified.

Q. What did the demand letter that was sent out ask for?

A. We had a number of pending pregnancy cases. It asked the company to obey the law as we understood the law to be, and not terminate people for pregnancy.

Q. Did it ask for anything more?

A. I don't think so. I don't remember. You would have to show me.

Q. It did not ask for money damages, did it?

A. Oh, I don't think that really would have been material at that time. You must realize that there were a number—the Darlene Preston case was fresh. She had just been discharged, she had just had her baby. We knew at that time of nothing except the Hillgruber and Charest case, which was pending in Los Angeles. Ninety-five percent of the members of these classes who had been terminated from 1965 on had never said boo. They had never made any protest to the Union or, as far as I know, to anybody else about their dis- [290] charges. We had a couple of live cases, Darlene Preston being the principal one, that raised the issue.

* * * *

[303]

Q. But, is it not usual that in bargaining situations to measure out what one fellow gives up and what the other fellow gets, and perhaps if he does not give up much we can get more, and so on?

A. Yes.

Q. You do that every day; that is your business?

A. We had to balance two things. One was including the entire class, and the other was money damages. I was so

concerned with the potentiality that 90 percent of this class may be entitled to nothing, no [304] reinstatement, no wages, nothing, that it was imperative that I get the entire class included in the settlement agreement, because I did not want to face the situation of going back to people who had quit in 1965 and 1966 and who had not said a word until the Union filed a lawsuit, until after the Union filed a lawsuit, and then have to litigate the question of whether or not they were entitled to settlement.

* * * *

[313]

Q. It was a real surrender of some rights, was it not, on the part of the members of this class?

A. It was a compromise, Mr. Pressman, in the judgment of the Union.

Q. It was a surrender of the right to substantial [314] moneys, was it not?

Mr. Carr: If your Honor please, there is no right to substantial moneys until there has been a determination of liability.

The Court: That is correct, but he can ask him the question.

By the Witness:

A. If they won the lawsuit and as an individual were held by the Court to be entitled to full benefits, obviously they would receive benefits which they are not receiving under the settlement agreement.

By Mr. Pressman:

Q. Which would amount to millions of dollars, would it not?

A. It might or might not, Mr. Pressman. As I told you, I was very concerned of the statute of limitations problem which could cut out over 90 percent of the members of this class, that has never been litigated. So, I don't know how much money or how many people might ultimately benefit. I only know that

there were legal problems which I had to evaluate when reaching the settlement agreement.

The Court: Offhand can you tell me what the statute of limitations was that you refer to?

[315] The Witness: There is a 90-day period of time from the incident of discrimination in which you have to file with the EEOC.

Now, it has been held in some cases that if one person files with the EEOC, that person can file a class action without all of the others going through the EEOC. But, to the best of my knowledge those were in continuing violation situations, unlike the present one, where you have people who were terminated and for five, six years may have done nothing. I do not know that those people would be properly included in the class, should the company ultimately raise the defense, and this concerned me.

By Mr. Pressman:

Q. The Cox case is the case you pointed out in the 7th Circuit, is it not?

A. The what case?

Q. Cox.

A. I don't recall the case by name.

Q. This was, in fact, a continuing violation, was it not?

A. I don't know. When they terminated—

Q. Why don't you know?

A. It would be an argument. They terminated [316] some people, or people resigned in '65 and '66. Those people did nothing up until the time when we created a class action by this litigation. I, frankly, as a lawyer just don't know what their rights would be, and it bothered me.

Q. Mr. Feldman, was there not a twofold violation on the part of the company here, both firing because of pregnancy and the refusal to hire?

A. I don't know that they made an application to hire in the various situations. I know that the situations fall into various categories. Some were terminated. They were terminated for different reasons. Some resigned. Some were given no reason at all. Some may have applied for reinstatement and some may not have. They fall into these various categories, and I don't know how many people fall into various categories. I have not tried to ascertain that.

Q. Mr. Feldman, is it not the duty of an attorney representing a class, or a person, where there is a possibility of a defense like statute of limitations, to investigate that defense, find out what the facts are, and make a judgment as to whether or not that defense would apply?

A. In this situation?

[317] Q. Yes.

A. I think it was almost impossible for me. In fact, I'll say it was impossible for me to go through every single one of the seven to eight hundred cases to make a determination without getting a court order making the information, documentation available, and frankly I saw no reason to do so. It wouldn't have altered my judgment.

Q. Did you ever ask for a court order?

A. We never reached that point in the litigation.

Q. In other words, if you had found that there was no statute of limitations defense, it would not have altered your judgment?

A. The primary consideration in my mind—what I am giving you admittedly are secondary considerations and those are the legal problems which could be contemplated in the lawsuit—the primary consideration in my mind when I made

the recommendations to the Union was the period of time that would be entailed in this litigation, and the fact that when stewardesses generally turn over so quickly, a year and a half, two years, there would be a lot of people who would want to fly who, even if ultimately [318] successful, if we litigated for five years, would have been deprived of the opportunity, and in my judgment those people should have been and were, in fact, given first priority.

* * * *

Argument of Mr. Shure

* * * *

[458]

The other reason he gave as to why he was convinced he ought to settle the case was because of the statute of limitations. This is really a novel theory, your Honor. What he is saying there [459] is that because the statute of limitations may have run against someone or some one hundred or two hundred people in the class—which they say is about 350 people—nobody in the class should get any back pay and all these people, regardless of whether they can return to work or not, those people who have been fired because of a violation of their civil rights, they will get not one red cent even if the statute of limitations hasn't run.

Now, how can we barter off in a case like this, and I can't understand counsel's reasoning for throwing out the baby with the bath. If some of the people are going to be thrown out, it is unfortunate. That is what happens in lawsuits. Sometimes you get stuck with something like that, but that doesn't mean that every single employee who has back pay coming should lose that, plus her seniority rights, and have that bartered away for what? So that TWA didn't have to pay a cent in back pay. So that TWA didn't have to lay off a single girl who is now working, and the Union could keep every dues-paying member on the payroll while my people sit in the background and wait for a job to open up, whether it is sooner or later, and if it does open up, who knows that when there is [460] a recession or something that they are not going to get laid off again?

* * * *

Argument of Mr. Feldman

* * * *

[516]

I was also concerned about the statute of limitations, as I have indicated, and contrary to Mr. Shure's statement, we are not talking about a few people.

[517] I am talking about people who were terminated and did nothing prior to the time Darlene Preston triggered everything that is happening, and that is most of the group.

Also, you must appreciate that as to most of these people there is no record of termination by the company. It is a resignation without any indication that I know of of a complaint. In some cases there may not be a complaint to the company and—

* * * *

Argument of Mr. Carr

* * * *

[545]

Mr. Carr: All of these girls, as I say, want to go back to work, and here are girls as to whom there is a great deal of doubt, as to whether or not—Mr. Feldman has estimated that 90 per cent would have a right to go back to work, and incidentally, we have been prepared, if we ever got to the issue, to raise these points on the particular girls.

Many of these girls have slept for five or six years on their rights, without ever doing anything about them. Mr. Feldman said there is a question as to 90 per cent of them having a right to go back to work.

We have agreed that all these girls, all these girls who were terminated, whether by resignation or involuntarily, may go back to work.

The Court: In other words, you are waiving any question of statute of limitations, if there is one?

Mr. Carr: That is correct. Furthermore, we have made a concession that they can choose the [546] base from which

they can operate. In the case of a married girl, this is an important concession. In addition, we are giving them the full seniority they left with, and that is what the girls under the present leave of absence agreement have. They do not come back with seniority for the time they were off. They come back with seniority as of the time they left.

Now, this seniority need not have been given to them at all on a settlement agreement, but they were given the full seniority they had earned, and this was, as Mr. Feldman pointed out, in derogation of those girls who are presently flying.

* * * *

Argument of Mr. Shure, resumed

* * * *

[566]

Mr. Feldman says that Mr. Shure says that only a few people would be affected by the statute of limitations in this case. That is not what I said, and I would like to correct it.

My statement was, let us assume for the purpose of argument that one hundred people or even two hundred people are barred by the statute of limitations out of the 350 names in the class which were supplied by TWA.

I am assuming that a majority of the people would have no rights, just for the purpose arguendo of this particular point. I made that [567] concession arguendo, but he picks it up and says that I only say a few people, and then he contests the point that I did not make.

If two hundred out of three hundred and fifty is not more than a majority, I am sadly mistaken, but I say, even conceding all that, even if there were one person or ten persons, you cannot take away the civil rights and the right to be made whole from any of these people, just because they happen to be a minority. That is what the laws are for, to protect the minority. The majority usually gets what it wants.

Short Rec. No. 2

* * (Caption—No. 70 C 2071) * *

JUDGMENT ORDER

(Entered March 17, 1972)

On this 17th day of March, 1972, the above entitled action having come on regularly to be heard, pursuant to the order entered herein dated February 3, 1972, upon an Agreement of Compromise and Settlement (the "Agreement") and it appearing that due notice of said hearing was given in accordance with the aforesaid order, and all parties having appeared by their attorneys of record, the Court having considered both the Agreement and statements and affidavits in opposition thereto by some members of the class and their counsel, and an opportunity to be heard having been given to all interested persons desiring to be heard:

It is ordered, adjudged and decreed that:

1. The Court has jurisdiction over the subject matter of this action and the parties hereto, including all former hostesses who were removed from the payroll of defendant between July 2, 1965, and July 31, 1969, because of pregnancy. They are the members of the class. Plaintiffs are adequate representations and have adequately represented them. The prosecution of this action as a class action is found to have been proper for all purposes of these proceedings. This action is a Rule 23 (b) (2) class action. This judgment is binding upon and adjudicates the rights of the members of the class with respect to all claims or causes of action arising out of, under, or in connection with any matter or transaction referred to or suggested by the complaint.

2. On February 8, 1972, notice of the hearing and a copy of the memorandum of understanding attached to the Agreement was mailed to each member of the class at her last known address, and on February 25, 1972, a supplemental notice was so mailed which stated that any member of the class may show cause why this lawsuit brought under Rule 23 (b) (2) of the

Federal Rules of Civil Procedure should not be adjudicated to be a Rule 23 (b) (2) class action, and the Court finds that due and adequate notice of the hearing has been given and full opportunity to be heard has been afforded to all parties and persons in interest.

3. The Court has examined and approves and hereby incorporates for all purposes and makes a part of this judgment the Agreement, which is attached in its entirety hereto as Exhibit A, and which was entered into by and between the parties to this action on July 14, 1971, including the Memorandum of Understanding attached thereto. The Agreement was arrived at fairly and in good faith and is found to be fair, reasonable and adequate for all parties and for all members of the class. The parties hereto are ordered and directed to implement the Agreement.

4. This judgment order and the Agreement shall not constitute any evidence or admission by the defendant that any unlawful act has been committed, and shall not be deemed to create any inference that there is any liability therefor. Defendant does not admit, either expressly or by implication, that it is subject to any liability whatsoever by reason of any of the matters complained of in this action and, on the contrary, expressly denies and disputes the existence of any such liability.

5. This action is hereby dismissed on the merits and with prejudice as against the defendant, its personal representatives, subsidiaries, past and present officers, directors, shareholders, employees and agents, and all of them are hereby discharged from any and all liability, claims, demands, or causes of action in law or in equity, arising under federal, state or local law, alleged or which could have been alleged in the complaint, and all claims or causes of action as to all members of the class arising or which may arise out of, under, or in connection with any matter or transaction referred to or suggested by the complaint in this action. This judgment shall be final and conclusive with respect thereto.

6. Jurisdiction is retained for the purpose of enabling any party to this final judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or implementation of the provisions of this final judgment and of the provisions of the Agreement.

ENTER:
/s/ J. S. Perry
Judge

Appendix No. 72-1335

LETTER TO TWA AND AMERICAN CLASSES REPORTING ON OUTCOME OF ACTIONS IN DISTRICT COURT (MARCH 20, 1972).

(Letterhead of Air Line Stewards and Stewardesses Association)

March 20, 1972

Report To ALSSA—TWU Representatives
And Members Of The Class Action
ALSSA Pregnancy Suit—American And
Trans World Airlines

Federal Judge Joseph Sam Perry has found "fair and adequate" the settlement agreements negotiated by ALSSA with TWA and American, and which provide for reinstatement of stewardesses and hostesses who were removed from the payroll because of pregnancy between the enactment of the Civil Rights Act and the signing of contract pregnancy agreements. After five days of hearings and arguments, Judge Perry, on March 17, upheld and approved the settlements between the Union and the two carriers. Strongly commending ALSSA for having achieved these most favorable agreements, the Federal Judge announced that, had ALSSA elected to litigate to a conclusion the pregnancy suits rather than effectuating the settlements, he would have ruled in favor of the two carriers because he did not consider the termination of stewardesses and hostesses for pregnancy to be violative of the Civil Rights Act.

This pronouncement from the Federal Court Judge, that the law suit would have been a losing one had he adjudged it on the merits, left members of the pregnancy class who objected to the ALSSA settlement, and their attorneys, who were in the courtroom visibly shaken and stunned. For they had steadfastly assumed, during the hearings, that it was an implicit legal certainty that the carriers had violated the law and that victory was assured if only the Union had not settled. Exemplifying

this attitude, which was consistently maintained during the hearings, was the declaration of one of the Attorneys for the objecting pregnancy class members that the suit involved nothing more than counting up the damages. Hence, the objecting members had insisted that any settlement short of total victory was a "sell out" by the Union. In addition, written communications to members of the class had been sent out by an objecting hostess and an objecting stewardess, in violation of the Court rules, in which it was flatly stated that the carriers could have no defense. This fallacious overconfidence was due in part to the fact that it was the same Judge Perry who had ruled in a recent United Air Lines case that termination of women only for marriage did violate the law. But, stated Judge Perry, when approving the ALSSA settlements, "pregnancy is different from marriage".

ALSSA President J. D. Preston, upon hearing the Court's ruling, commented that "ALSSA certainly has been vindicated. Once again, collective bargaining has proved to be the most effective way of achieving ALSSA's goals." Preston added that "collective bargaining has been the tool which in a few short years has changed the homogenous character of the cabin crew which so recently was limited to young, unmarried girls." Preston referred to those who, although well-intentioned, were so emotionally absorbed in their own individual problems or objectives that they could not maintain any perspective over the larger picture. He mentioned the EEOC intervention which had delayed the pregnancy case one-half year by an unsuccessful attempt to block the settlement agreements, the EEOC having been roundly criticized for its conduct by both Judge Perry and the United States Court of Appeals. Preston also made reference to a few overly exuberant members of the pregnancy class who had been sending in hate mail and accusing the Union of everything from a sellout to taking bribes from the companies. Preston stated that "although I deeply sympathize with these ladies in their plight as victims in this situation, that sort of thing is unwarranted, unfair and uncalled for, particu-

larly in view of the fact that ALSSA has been the premier organization in eliminating all types of discrimination in this country.

Preston also warned that: "Judge Perry's interpretation of the law should not be taken by any carrier as sanction for discriminatory treatment to our members."

During the hearings before Judge Perry, ALSSA's attorney testified at length in support of the ALSSA settlement agreements. He stated that, in his opinion, the termination of the pregnancy class by the carriers was violative of the law, but that honest differences of opinion existed on this question between him and the renowned lawyers for the carriers, for whom he had great professional respect. The problem facing the Union was that no one would know the answer for certain until the issue was decided by the United States Supreme Court, and the various appeals involved could entail at least five years. In the meantime, even assuming ultimate success, change in life circumstances could effectively deny members of the pregnancy class the benefits of the right to reinstatement which might ultimately be obtained.

But, the ALSSA Attorney continued, a victory on the question of whether termination for pregnancy was illegal could well prove to be only illusory for the individual stewardesses and hostesses for a variety of reasons which he detailed in his testimony and which are summarized below:

(1) Time limits are contained in the Civil Rights Act requiring that a charge "shall be filed within ninety days after the alleged unlawful employment practice occurred." Since an estimated 90% of the members of the pregnancy class had been terminated long before ALSSA filed a charge in 1970 at the request of some members of the class who had then just been terminated, the claims of practically the entire class might be held to be untimely and barred in their entirety.

(2) Due to husbands' jobs and family locations, it could be anticipated that many of the pregnancy class members would be unable to return to their former bases; hence the right to do so, if obtained by court order, might prove to be meaningless. For this reason, the settlement agreements allow for a choice of bases by the returning pregnancy class members.

(3) The Civil Rights law specifies that "No order of the Court shall require the . . . reinstatement . . . of an individual as an employee, or *the payment to him of any back pay,* if such individual was . . . discharged for any reason other than discrimination on account of . . . sex." In a significant number of the individual cases, the carriers are maintaining that the termination was for dishonesty in concealing and failing to report pregnancy rather than for pregnancy itself. Two of the principal members of the American class who were protesting the settlement testified that they flew seven months while pregnant before being terminated. One of them was not only protesting on her own but had been issuing written communications (in violation of the Rules of the Federal Court) to the other members of the American class urging and advising them on how to defeat the settlement. In addition, she had retained lawyers and had been communicating with the EEOC about her protests. The ALSSA Attorney asked her on cross examination; (a) Has anyone advised you that your having flown for seven months of pregnancy prior to notifying the Company of your pregnancy could conceivably defeat your claim entirely? (b) Has anyone advised you of any of the other potential infirmities to these claims? (Which the ALSSA Attorney was elaborating on in his testimony.) (c) Have you given any consideration to these potential problems before arriving at your decision to protest the settlement? Her answer to each of these three questions was "no."

(4) The Civil Rights Law specifies that "the court, in its discretion, may allow the *prevailing party* . . . a reasonable Attorney's fee as part of the costs. . . ." Stated otherwise the

losing party or parties may be ordered to pay the Attorney's fees of the winning party. No effort was made to ascertain or compute the amount of the Attorney's fee to which the carriers' counsel would be entitled should the carriers have turned out to be the "prevailing party." Suffice it to say that Corporate Attorneys are generally known to charge significantly higher fees than Labor Union Attorneys. This statutory provision was emphasized in the hearings because the communications that had been sent to members of the class by a stewardess and a hostess, in violation of the rules of Court, had flatly stated that objecting class members would have no responsibility for legal fees.

(5) The Civil Rights Law provides that if the employer is found to have violated the law, "the Court *may* enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as *may* be appropriate, which *may* include reinstatement ... of employees, *with or without* back pay. ... Interim earnings or *amounts earnable with reasonable diligence* by the persons discriminated against *shall* operate to reduce back pay otherwise allowable." The ALSSA Attorney raised the question as to whether those women who, for example, had spent the last several years unemployed and at home raising their infants were being realistic in their expectation that full or any back pay would be awarded them pursuant to the statutory language quoted above.

(6) The ALSSA Attorney expressed further concern over the fact that a significant number of the individual cases involved resignations rather than discharges. The question of whether they were voluntary or coerced might be difficult to prove. He contemplated over the problem of proof facing a woman who resigned in 1966, never officiallly protested to the carrier, never filed a grievance with ALSSA, never filed a charge with the EEOC and was not heard from until recently when she became apprised that ALSSA had sued on her behalf. How, asked the

ALSSA Attorney, is that woman going to sustain her burden and establish that she was "discharged" because of pregnancy? These matters as well as the primary objective of effectuating reinstatement of the pregnancy group as quickly as possible were among the factors which militated in favor of the settlement agreement. And this was of course without the benefit of the knowledge that the Judge could, if the case had been tried, deny any relief whatsoever, because, in his view, the carriers had not violated the law when terminating for pregnancy. The ALSSA Attorney concluded his testimony urging that the members of the class calm down, control their justified indignation and exercise caution and prudent judgment in the consideration and evaluation of the settlement agreements and these potential obstacles to the law suit which would have existed in the event there had been no settlement agreements.

During the hearings before Judge Perry, much attention was devoted to the already mentioned written communications with questionnaires that had been sent to members of the pregnancy class eliciting opposition to the settlements by a TWA hostess and an American stewardess in direct violation of a rule of the Federal District Court which prohibits any such communications to members of the class "until such time as an Order may be entered by the Court approving the communication". It is because of this rule that neither ALSSA nor its Attorney up until now have attempted any communication with members of the class without the communication having prior Court approval. The contents of the communications sent out by the hostess and stewardess were misinformative, fallacious and inflamatory (sic); yet ALSSA could not respond to them until now because any such comment would have been in derogation of the court rule. In conformity with the court rule, ALSSA reserved its position, explanation and justification of the settlement agreement for the open court hearing.

Additionally, when Judge Perry was considering the appropriate form of notice of the settlement hearings, the question of whether questionnaires should be submitted to the class prior to

the hearing on the settlement agreements was specifically raised before him by the EEOC; the decision of the Court was that this should not be done. Yet, the communications and questionnaires were submitted to the class members shortly thereafter by the TWA hostess, who testified that she received the list of names and addresses of class members from the EEOC, and by the American stewardess, who testified that she had been in communication with the EEOC. Judge Perry stated that he would not chastize (sic) the stewardess and hostess involved because they obviously were ignorant of the court rule; however, he severly (sic) condemned the EEOC for its participation in the unfortunate situation and the confusion thereby created.

The settlement agreements will become effective unless a party prior to April 17, 1972, appeals from Judge Perry's order, in which case the settlement agreements once again will be held up pending the appeal. Should the agreements become effective, additional information will be furnished to the members of the pregnancy class advising them of how, when and where to apply for reinstatement. It is hoped by ALSSA that no appeal will be forthcoming which will further delay the reinstatement of those members of the pregnancy class who desire to return to work. Of particular concern is the effect of another delay on the vacancies which will be available for returning members. At ALSSA's insistance (sic) the two carriers submitted evidence to Judge Perry showing that they will have open sufficient vacancies to accommodate the entire class within a short period should the settlement agreements be approved by the Court. However, should the effective date of the agreements be further delayed, there is no guarantee that those vacancies will still exist.

ALSSA requested and received prior permission from Judge Perry to communicate about this case before making this publication.

This Report Has Been Prepared By ALSSA Chief Attorney, Gilbert Feldman.

March 20, 1972

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO et al., Plaintiffs,

v.

AMERICAN AIRLINES, INC., Defendant.

Appeal of Darlene PRESTON et al., in No. 72-1336.

Appeal of Bonnie PULSKAMP et al., in No. 72-1503.

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO et al., Plaintiffs,

v.

TRANSWORLD AIRLINES, INC., Defendant.

Appeal of Patricia A. SANTINI et al., Darlene PRESTON et al., Plaintiffs-Appellants,

v.

AMERICAN AIRLINES, INC., et al., Defendants-Appellees.

Nos. 72-1336, 72-1503, 72-1335, 72-1399.

United States Court of Appeals, Seventh Circuit.

Argued Sept. 11, 1973.

Decided Dec. 21, 1973.

Before KILEY, FAIRCHILD and STEVENS, Circuit Judges.

FAIRCHILD, Circuit Judge.

These appeals form a sequel to Air Lines Stewards, etc., Loc. 550 v. American Airlines, Inc., 455 F.2d 101 (7th Cir., 1972), and some of the background facts appear there. That decision, affirming denial of intervention by EEOC, was filed January 18, 1972. Thereafter notices of hearing in the district court on approval of the settlement, referred to at 455 F.2d 103, were mailed to members of the class in each action. A hearing was held. Plaintiff union (ALSSA) and the defendants supported the settlement, and the support of several individual members of the class was made known. Objections on behalf of dissatisfied members of the classes, including several named individual plaintiffs, were filed or made known at the hearing.

On March 17, 1972, a judgment was entered in each action (American Airlines, Inc., and Trans World Airlines, Inc., being the respective defendants), approving the settlement, ordering it implemented, and dismissing the action on the merits. Appeals were filed by members of the classes, including certain named plaintiffs, in each case. A related action against American and ALSSA was also dismissed, and those plaintiffs appealed.

Appellants contend that the district court should not have approved the settlements because ALSSA (certified bargaining agent for airlines cabin attendants under the Railway Labor Act), which negotiated the settlements disposing of the interests of members of the class, had interests antagonistic to them. Appellants also maintain that they were entitled to exclude themselves from the action and avoid the binding effects of the judgments. Other arguments are urged in addition.

Until October, 1970, defendant airlines followed the practice of discharging, permanently, a stewardess who became pregnant. On August 18, 1970, ALSSA and 12 stewardesses who

had lost their jobs under this policy commenced an action against American challenging this practice as unlawful sex discrimination, in violation of 42 U.S.C. § 2000e et seq. The complaint asserted that the action was within Rule 23(b)(2), F.R.Civ.P., and that the class consisted of all present and former American stewardesses employed at any time since July 2, 1965, the effective date of the Civil Rights Act of 1964, who had been, desired to be, or would in the future desire to be, pregnant. The complaint sought declaratory, injunctive, and monetary relief. On the same day, ALSSA and five individuals filed a similar action against TWA.

Counsel for ALSSA signed the complaint as attorney for the plaintiffs and conducted the litigation and negotiations for settlement. He did not consult the individual plaintiffs nor any other members of the class concerning the terms of settlement.

By October, 1970, ALSSA and the airlines had made collective bargaining agreements which eliminated the challenged practice prospectively. Thus, although the class defined by the complaints included currently employed stewardesses who, presumably, had an interest in the declaratory and injunctive relief sought, that segment of the class had little further interest in the action, except for such interest as the junior among them would have adverse to the reinstatement of previously discharged stewardesses. Since the currently employed stewardesses were more actively the constituents of ALSSA, the change of circumstances made ALSSA at least a less adequate representative of the remaining members of the class than it may have been considered for the entire original class.

In July, 1971, counsel agreed on a settlement, subject to court approval. The proposed terms required discharged stewardesses who desired re-employment to notify the airline within 60 days from court approval. They would then be placed on a preferential hiring list, to be employed to fill vacancies before others were hired. When offered a job, a stewardess must

accept within 10 days and meet specified standards of physical condition. The airline would have no liability whatsoever to any stewardess who failed, timely, to give the notice of desire to be re-employed or notice of acceptance of an offer. If reemployed, the stewardess would start with the same seniority as she had up to the date of termination, in the case of TWA, or that seniority plus 90 days additional in the case of American. Under the agreement, an order would be entered defining the class, in each case, as all former stewardesses who were removed from the payroll because of pregnancy, between July 2, 1965 and July 31, 1969, in the case of TWA, and August 11, 1970, in the case of American. If approved the settlement and resulting judgment, would bind all members of the class.

It does not appear that the district court made any order concerning the maintenance of these actions as class actions, pursuant to Rule 23(c)(1), until July 16, 1971, after the settlement had been proposed. On that date, the court ordered that the class in each action be redefined in accordance with the settlement agreement, and that the action be maintained as a class action. The order did not expressly address the fulfilment of the prerequisites listed in Rule 23(a) nor of any additional requirement of Rule 23(b). Presumably the court did not consider (b)(3) applicable, as it did not order a notice pursuant to (c)(2).[1]

[1] Rule 23(b)(3) provides:

"An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution of defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the

Notices of hearing on approval of the settlement were sent out, both in July, after which the hearing was delayed by the appeal, and again the next February.[2]

At or before the March, 1972 hearing on approval of the settlement, opposition to it was manifested by some of the named plaintiffs and by other members of the class in each action. With some variations, the objectors wanted all, or more nearly all, of the "whole loaf", i.e., reinstatement with seniority accrued to date, and back pay. Several members of the American class, the appellants here in No. 72-1503, had brought their own action July 14, 1971 in the Central District of California. They had attempted to opt out of the instant action, their California action, meanwhile, having been stayed. The district court heard objecting plaintiffs and class members, and their attorneys, only in the capacity of objectors, and in effect recognized ALSSA as the sole representative plaintiff, representing all class members, including the individual named plaintiffs.

The judgments entered as a result of the hearings determined that "Plaintiffs", without distinguishing between ALSSA and

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particular forum; (D) the difficulties likely to be encountered in the management of a class action."

Rule 23(c)(2) provides:

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

[2] Rule 23(e) requires notice to class members of a proposed settlement. The appellants contest the adequacy and accuracy of the notice procedures used here. In light of our disposition of the balance of the case, we do not reach this issue.

other plaintiffs, are adequate representatives of the class and have adequately represented them; that the action is a Rule 23(b)(2) class action;[3] that the judgment is binding on all members of the class; and that the settlement is fair, reasonable, and adequate for all.

On February 28, 1972, Darlene Preston, a plaintiff in the action against American, above referred to, had brought a new class action against American and ALSSA predicated upon a claim of unlawful discrimination similar to that in the earlier complaint, and upon a claim that ALSSA failed to fulfill its duty of fair representation. Judgment was entered March 20, 1972 dismissing the complaint, apparently on the ground that the claims had been adjudicated by the judgment of March 17, 1972.

1. *ALSSA's Representation of the Class.*

Mr. Feldman, counsel for ALSSA, and attorney of record for all the plaintiffs, testified in support of the settlement.

He took into consideration the proposition that the answer to the ultimate question of liability, common to all members of the class, i. e., whether the discharge policy was a violation of the Act, was less than a certainty. He felt that about 90% of the members of the class faced a serious legal question as to recovery because they had been terminated long before any complaint was filed with EEOC and these stewardesses might not be able to rely on the later filing by other members of the class. He noted that the circumstances of termination varied and that these differences might raise questions concerning

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[3] Rule 23(b)(2) provides:

"An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

"(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or . . . ."

recovery by members of the class. The airlines had terminated some on the ground of pregnancy, and others on the ground that they had concealed pregnancy, in violation of a company rule. Others had voluntarily resigned after becoming pregnant, and others resigned, but claimed they were coerced.

Mr. Feldman testified that ALSSA made the decision to agree to the settlement. One advantage was that it afforded an opportunity to every member of the class to return to work, including those against whom the statute of limitations defense might have been urged, as well as those whose claim did not have that problem; those whose termination had clearly been grounded on pregnancy, as well as those who had less clearly been terminated for that cause.

Mr. Feldman conceded that ALSSA had obligations to groups which had conflicting interests. Junior currently employed stewardesses would be harmed by immediate reinstatement of former stewardesses, and the settlement did not provide such reinstatement. Seniority has a very important effect on stewardesses' trip assignments and the like. Thus the former stewardesses who were reemployed pursuant to the settlement would want seniority to accrue during the period they had been out of the job, but the greater the seniority awarded to them, the larger the number of currently employed stewardesses who would be put to disadvantage. Mr. Feldman testified that the extent of seniority agreed on represented a compromise of the interests of the various groups.

The airlines said they were unwilling to negotiate concerning back pay. Mr. Feldman conceded that if the matter were litigated and liability established, there would probably be individual members of the class who could establish back pay claims. He estimated that full litigation would consume about five years. ALSSA decided to subordinate the interest of those who wanted to recover money to the interest of those who desired to return to work. This, he said, was an example of bargaining agent responsibility, to resolve in good faith the

conflict in interest between groups, both of which are represented by the union.

Rule 23(a)(3) requires that the claims of a representative plaintiff be typical of the claims of the class and (4) requires that the representative plaintiff will fairly and adequately protect the interests of the class. It has been indicated "that the reasons for requiring an individual plaintiff in a class action to be a member of the class do not necessarily preclude an association from representing a class where its *raison d'etre* is to represent the interest of that class."[4] It seems clear, however, that unless ALSSA's status as certified bargaining agent under the Railway Labor Act alters the situation, it cannot, under the circumstances, be treated as the equivalent of a group of former stewardesses terminated on account of pregnancy, and thus members of and adequate representatives of, the class.

ALSSA admittedly considered and to some extent protected the interests of the currently employed stewardesses in working out the settlement. They, who are presently presumably in control of ALSSA, are not members of the class as now defined, and they have antagonistic interests. In Hansberry v. Lee, 311 U. S. 32, 45, 61 S. Ct. 115, 85 L. Ed. 22 (1940), the Supreme Court held that a judgment in a class action can only bind absent class members where the representative's interests coincide with those of the balance of the class.

Counsel for ALSSA apparently would concede that if ALSSA were deemed merely an association of presently employed stewardesses, or even of both presently and formerly employed stewardesses, it would not be deemed an adequate representative of the class. Counsel argues, however, that ALSSA's role as an exclusive collective bargaining agent for the stewardesses employed by these airlines gives it the power to accommodate and adjust the rights of present and former stewardesses which

[4] Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 937 (2d Cir., 1965).

spring from Title VII, subject only to its obligation of fair representation. If this position were adopted, it need only be shown that ALSSA acted in good faith and in a manner which could be deemed fair, in making the choices involved in the settlement. Approval of the settlement could then be set aside only if the findings of good faith and fairness were found clearly erroneous.

In Steele v. Louisville & Nashville R. R. Co., 323 U. S. 200, 65 S.Ct. 226, 231, 89 L.Ed. 173 (1944), the Supreme Court held that the Railway Labor Act, in requiring the carrier to bargain with the chosen representative, operated to exclude any other representative, and deprived minority members of the craft of the right to choose a different representative or to bargain individually as to matters which are properly the subject of collective bargaining. It follows that the representative may make contracts having unfavorable effects on some of those represented, but the representative has "the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." A similar holding was reached under the National Labor Relations Act in Ford Motor Co. v. Huffman, 345 U.S. 330, 336, 73 S.Ct. 681, 97 L.Ed. 1048 (1953).

In Humphrey v. Moore, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370 (1963), the Supreme Court dealt with challenges to the resolution of grievances pursuant to a multi-party collective bargaining agreement. At p. 349, 84 S.Ct. at p. 371, the Court said, concerning the antagonistic interests of two groups, that "both groups [were] represented by the same union, whose president supported one group and opposed the other at the hearing before the Joint Conference Committee. But we are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another."

In Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967), a union member who had been discharged sued the union for its refusal to take the grievance to arbitration under the collective bargaining agreement. The Supreme Court found no evidence of personal hostility or bad faith on the part of the union officers, and set aside a verdict in favor of the plaintiff. "Having concluded that the individual employee has no absolute right to have his grievance arbitrated under the collective bargaining agreement at issue, and that a breach of the duty of fair representation is not established merely by proof that the underlying grievance was meritorious, we must conclude that that duty was not breached here." p. 194, 87 S.Ct. p. 919.

Counsel suggests that accommodation of the Railway Labor Act with Title VII of the Civil Rights Act of 1964 requires that the collective bargaining representative be accorded the same power and held to the same degree of duty as the cases just cited accord it in the formulation and administration of collective bargaining agreements and the rights of individual employees thereunder. We are unable to agree.

Title VII, unlike the National Labor Relations Act and Railway Labor Act, does not create nor necessarily recognize powers of exclusive representation, either for those currently employed in the unit nor for a group which would include those claiming to have been unlawfully discharged. The situation is not parallel, and it does not seem to us that policy reasons militate in favor of similar status for the bargaining representative. An individual who claims to have been the victim of unlawful discrimination has the right to redress individually, whether the discrimination was an isolated act or a general practice.

> "The real party in interest in conciliation endeavors is the employee alleged to have been discriminatorily treated. He is completely free to accept or reject the proposals of union or employer as well as the position taken by the [Equal

Employment Opportunities] Commission." Air Lines Stewards, etc. Loc. 550 v. American Airlines, Inc., 455 F.2d 101, 106 (7th Cir., 1972).

Surely the fact that a labor organization is defined in 42 U.S.C. § 2000e and made a potential defendant in unlawful employment practice cases does not, as counsel seems to suggest, indicate an intention on the part of Congress that a collective bargaining representative play a special role in Title VII actions to redress unlawful employment practices by an employer.

We think a union may serve its members by being plaintiff in a suit to vindicate their civil rights. "There is nothing in the law which precluded the Union from recognizing the injustice done to a substantial minority of its members and from moving to correct it." Bowe v. Colgate-Palmolive Company, 416 F.2d 711, 719 (7th Cir., 1969). When it espouses the interest of one group of its Members, it doubtless has an obligation of fairness to any members whose interests are in conflict. But except for the area of collective bargaining and its necessary incidents, the union has no unique authority to compromise the rights of its members. Its adequacy as a representative party in a class suit, and its authority to compromise the rights of its members in a class suit when such rights do not arise out of collective bargaining agreements are to be tested and judged in the ordinary way.[5]

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[5] See Cook County College Teachers U., Loc. 1600, A.F.T. v. Byrd, 456 F.2d 882, 885 (7th Cir., 1972); Mungin v. Florida East Coast Ry. Co., 318 F.Supp. 720 (M.D.Fla., 1970), aff'd 441 F.2d 728 (5th Cir., 1971), cert. denied sub nom. Howard v. Florida East Coast Ry. Co., 404 U.S. 897, 92 S.Ct. 203, 30 L.Ed. 2d 175; Amalgamated Meat Cutters of No. Am. V. Safeway Stores, Inc., 52 F.R.D. 373, 375 (D.Kan., 1971). *Amalgamated Meat Cutters* is similar to the present case. There, certain of the defendant's female employees and their union filed a class action alleging that the defendant had failed to pay men and women the same wage for the same work, a violation of 42

2. *The Right of Class Members to Exclude Themselves From the Actions Originally Brought.*

Appellants argue that the district court must offer the members of the class the opportunity to "opt out", or exclude themselves from the class. Rule 23(c)(2) requires that such opportunity and an alternative opportunity to enter an appearance through counsel, must be afforded in any class action maintained under Rule 23(b)(3). Unless a class action is maintained under Rule 23(b)(3), no right to opt out exists. All members of the class are bound by the judgment.

On July 16, 1971, when the first orders dealing with the actions as class actions were entered, the court did not expressly address the question whether or not they fell under Rule 23(b)(3). In the judgments, the court held they fell under Rule 23(b)(2), thus foreclosing the opportunity of any member of the class to exclude herself.

Rule 23(b)(2) applies to class actions in which

> "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . ."

When these actions were filed, the class included both stewardesses who had been terminated for pregnancy and those

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U.S.C. § 2000e-5(e). The union and the employer negotiated a compromise and sought the court's approval under Rule 23(e). Certain of the class members, including one of the individual named plaintiffs, objected to the compromise as unfair. The district court refused to approve the settlement and ordered independent counsel appointed for the dissenting class members. The court observed that:

> "However, counsel for the plaintiffs has appeared in a dual capacity—that is, both the Union's attorney and attorney for the Class members. It is apparent from the communications in the file, as well as the expressions in open court, that the interests of the Union as a plaintiff, and the interests of at least a portion of the members of the Class are in conflict and not identical." 52 F.R.D. at 375.

who might in the future be terminated for that cause. The latter were primarily, perhaps solely, interested in a declaration that the practice of termination for that reason is unlawful and an injunction against it. As to that group, (b)(2) would clearly be applicable.

Subdivision (b)(3) applies where:

"the court finds that the questions of law or fact common to members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fair and efficient adjudication of the controversy."

All the stewardesses share the common question of whether the discharge-for-pregnancy policy was lawful. Those who had already been discharged were interested in reinstatement with or without back pay, and assuming a favorable decision on the common question, the entitlement of any particular former stewardess to reinstatement, back pay, and accrued seniority would depend on the facts peculiar to her. The amount of back pay would be computed separately for each, and reduced by her interim earnings.[6] Mr. Feldman's testimony shows other differences among individual cases. Some who had not filed with EEOC might have difficulty in establishing the right to rely on the filings of others. The manner and stated cause of termination of employment varied.

As to the discharged stewardesses, the class actions would, even at the beginning, have had to be maintained under (b)(3), with each such stewardess having the right to exclude herself, or appear through counsel.

When the airlines ended their discharge policy, the actions became virtually moot as far as the currently employed stewardesses were concerned, and purely prospective relief against the practice became of little moment. The (b)(3) character of

[6] 42 U.S.C. § 2000e-5(g).

the actions, while always present as to the discharged stewardesses, became even more obvious.

In *Gerstle* v. *Continental Airlines, Inc.*, 50 F.R.D. 213 (D.Colo., 1970), a former stewardess brought a class action, seeking injunctive relief, back pay, and reinstatement for stewardesses terminated because of marriage. The airline had dropped the policy after terminating plaintiff. The court held that in view of the change in policy after terminating plaintiff. The court held that in view of the change in policy there was no case for injunctive relief, but that the action should proceed under (b)(3) as to the other types of relief. The present actions are similar.

We have no doubt that even in a class action subject to (b)(3), situations could arise where individual members of a class so clearly acquiesced in and accepted the efforts of their union or other plaintiff for so long a period and under such circumstances that they would be estopped from exercising their right to exclude themselves and "spoiling" a settlement obtained by such efforts. Nothing revealed in this record puts these cases in that posture.

The actions originally brought against the two airlines should have been, and should henceforth be treated as (b)(3) class actions with the attendant right of a class member, for a reasonable interval, to exclude herself or appear through counsel pursuant to Rule 23(c)(2).

3. *Remand of the Actions Originally Brought Against the Two Airlines.*

On remand, the district court should:

(1) Permit one or more of the named plaintiffs or other members of the class in each action to replace ALSSA as the representative of the class. If it should appear desirable for adequate representation of all class members, subclasses, each with its own representative, may be created.

(2) Require that notices, pursuant to Rule 23(c)(2) be sent, offering to each member of the class the opportunity to exclude herself from the class or appear through counsel.

(3) Proceed with the litigation unless settlement as to some or all issues is agreed on by the appropriate parties, and approved, on notice, by the court.

4. *The Preston Action Brought in February, 1972.*

We express no conclusions with respect to this action except that, since it was dismissed on the theory that the claims therein have been adjudicated by a judgment now being reversed, the judgment dismissing it should also be reversed.

The judgments appealed from are reversed and the causes remanded for further proceedings consistent with this opinion. Circuit Rule 23 shall apply on remand.

Rec. No. 1

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

Anne B. Zipes, Frances M. Swift, *et al.*,
Plaintiffs,

vs.

Air Line Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO and Trans World Airlines, Inc.,
Defendants.

Civil Action
No. 74 C 2063.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF AND DAMAGES

(Filed July 22, 1974)

Now Come Plaintiffs, Anne B. Zipes and Frances M. Swift, by their attorneys, and complain of the Defendants as follows:

1. This is a class action, authorized and instituted pursuant to Rule 23 Fed. Rules Civ. Proc., 28 U. S. C. and Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII"), 42 U. S. C. § 2000e *et seq.*, particularly 42 U.S.C. § 2000e-3(a). Jurisdiction of this Court is invoked pursuant to 28 U. S. C. §§ 1343(4), 2201, 2202 and 42 U. S. C. § 2000e-5.

2. Declaratory and injunctive relief, damages including punitive damages, and other appropriate relief, including attorneys' fees and costs, as authorized by 42 U. S. C. § 2000e-5(g) and (k), are requested herein.

3. This action seeks relief from certain discriminatory acts perpetrated by the Defendants against Plaintiffs and the class they represent herein. Said discriminatory acts were and are

punitive in nature, and Defendants committed said acts in retaliation for participation of Plaintiffs and the class in a Title VII class action against Defendant Trans World Airlines, Inc. (hereinafter "TWA") filed in this Court on August 18, 1970, entitled *Air Line Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO* v. *Trans World Airlines, Inc.*, Civil Action No. 70 C 2071 (hereinafter "the original class action"), still pending in this Court, and were and are specifically in violation of Title VII, 42 U. S. C. § 2000e-3(a), which provides in part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . or for a labor organization to discriminate against any member thereof . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

The discriminatory retaliatory acts were and are unlawful regardless of the merit of the underlying charges and proceedings in connection with which those acts occurred.

4. The individual named Plaintiffs herein and members of the class they represent were employed by TWA as flight attendants, flight hostesses, (hereinafter "stewardesses") at some time on or after July 2, 1965 (the effective date of Title VII). Each named Plaintiff and class member was a member of Defendant Air Line Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO (hereinafter "the Union") at some time or times during the period beginning July 2, 1965. Each named Plaintiff and class member was deprived of her stewardess employment on or subsequent to July 2, 1965 by reason of TWA's policy of discharging stewardesses who had become pregnant and refusing to afford stewardess employment to women with children, a policy in which the Union acquiesced. Each named Plaintiff and class member was and is a member of the plaintiff class in the original class action, which was brought

to challenge said policy and to seek affirmative relief from its continuing discriminatory effects on plaintiffs and the class.

5. The Union was and is a labor union and representative of employees as defined in the Railway Labor Act, 45 U. S. C. § 151, and a labor organization as defined in Title VII, 42 U. S. C. § 2000e(d). The Union was a named plaintiff, along with several discharged stewardesses, in the original class action. The Union's main business office was and is located in the City of Chicago and State of Illinois. The unlawful employment practices committed, and being committed, by the Union, as alleged herein, have occurred and are occurring in the City of Chicago and State of Illinois. In the event the Union has been transmuted into a successor union or unions, this Complaint is alleged to include said successor or successors.

6. TWA is a carrier by air and an employer as defined in the Railway Labor Act, 45 U. S. C. §§ 151, 181 and is an employer engaged in an industry affecting commerce, employing twenty-five or more persons, as defined in Title VII, 42 U. S. C. § 2000e(b). TWA does business in the City of Chicago and State of Illinois. The unlawful employment practices committed, and being committed, by TWA, as alleged herein, have occurred and are occurring in the City of Chicago and State of Illinois.

7. This class action is brought pursuant to Rule 23 Fed. Rules Civ. Proc., 28 U. S. C. on Plaintiffs' own behalf and on behalf of a class consisting of all persons who were and are members of the plaintiff class, as defined by the judgment order of this Court entered March 17, 1972, in the original class action. The class, consisting of more than three hundred (300) persons, is so numerous that joinder of all members is impracticable. There are common questions of law and fact, and the claims of Plaintiffs are typical of those of the class. In committing the unlawful employment practices alleged herein, Defendants have acted and refused to act on grounds applicable to the class, thereby making appropriate final injunctive,

declaratory and remedial relief with respect to the class as a whole. Plaintiffs, as representative parties, by their counsel, will fairly and adequately represent and protect the interests of the class.

8. Defendants have engaged in, and continue to engage in, unlawful employment practices with respect to the class in violation of Title VII, 42 U. S. C. § 2000e-3(a), as follows:

(a) During the pendency of the original class action Defendants entered into an agreement of compromise and settlement with each other, in an attempt to forcibly dispose of the claims of the class for certain relief such as reinstatement, back pay and full accrued seniority. In return each class member was to be given the right to apply to be placed merely on a preferential hiring list from which she might be selected and employed, as stewardess job openings became available, with whatever seniority she may have had at the time of termination of her employment. Certain other preconditions were included. (A copy of that settlement is attached hereto as Exhibit A, and made part hereof.)

(b) After hearings this Court approved the settlement terms by its judgment order of March 17, 1972. (That order, among others, was reversed on December 21, 1973 by the United States Court of Appeals for the Seventh Circuit. 490 F. 2d 636. Among other reasons for reversal, the Court held that the Union and its counsel had not afforded adequate representation to the other individual named plaintiffs and class members.)

(c) After that approval of the settlement, a Notice of Appeal was timely filed on April 11, 1972 by Plaintiff Zipes and two additional appellants who were plaintiffs in the original class action. On or about April 20, 1972, after the Notice of Appeal was filed, the Defendants entered into an agreement with each other to coerce all class members, including plaintiffs other than the Union, to give up their

rights to benefits under the then-pending appeal as a condition of possible reemployment under a so-called "Amendment" to the settlement. (A copy of that "Amendment" is attached hereto as Exhibit B and made part hereof.) Under that "Amendment" class members were offered the opportunity to receive the minimal benefits of the settlement (then pending before the Seventh Circuit on appeal) on the condition that they execute a written waiver of rights, including those which might accrue to them as members of the class should the appeal be successful and subsequent proceedings result in an award of additional and greater relief than that offered in the settlement. Said "Amendment" was conceived, executed and sent to the class members without the knowledge or approval of this Court, but carried the caption of the original class action in a bald attempt to make it appear that the "Amendment" had the sanction of this Court.

(d) Those class members who succumbed to the coercion by the Defendants and accepted the benefits offered in the "Amendment" were placed on a preferential hiring list, while those class members who did not waive their rights were denied the opportunity to then seek reemployment as stewardesses under the settlement terms. Those who accepted the benefits offered in the "Amendment" and did return to work returned with minimal benefits, not including those additional benefits sought in the original class action. Because of their limited seniority status upon returning to work, those class members who did submit to the coercion were more vulnerable to layoffs (e.g., those which occurred during the recent energy crisis) and subject to many relative disadvantages attendant upon the lack of a more senior stewardess status. By requiring of those class members the execution of a waiver of rights, Defendants discriminated against them by depriving them of their federally-protected right to participate without retribution in proceedings seeking

full affirmative relief from the discriminatory employment practices complained of in the original class acion. On the other hand, those who did not accept the discriminatory offer were deprived of any opportunity to then seek reemployment as stewardesses, even with the minimal benefits given to those who did waive their rights and seek reemployment.

(e) In connection with the offer of the "Amendment" Defendants, or one of them, corresponded with class members, making representations designed to further assist Defendants in their efforts to discriminate against the class, as alleged herein. (A copy of an illustrative example of such correspondence is attached hereto as Exhibit C, and made a part hereof.)

In their offers of settlement benefits under the "Amendment" and in their activities to date designed to coerce class members into accepting those offers, Defendants have engaged, and continue to engage, in intentional practices designed to reduce the membership of the class in the original class action, deprive class members of those benefits to which they are entitled by law by reason of the prior unlawful terminations of their employment, and discourage and prevent class members from fully asserting their Title VII rights. This conduct by Defendants, aimed exclusively at persons who were and are members of a litigant plaintiff class in a Title VII class action, constitutes differing and discriminatory treatment in violation of Title VII, 42 U. S. C. § 2000e-3(a).

9. The actions of the Defendants, as hereinabove alleged, constituted a conspiracy between them, maliciously carried on, to deprive the members of the class of their civil rights in violation of Title VII.

10. On or about May 16, 1972, within one hundred, eighty (180) days from the date of the initial unlawful employment practices alleged herein, each of the named Plaintiffs filed a Charge of Discrimination with the Equal Employment

Opportunity Commission (hereinafter "the EEOC") in accordance with Title VII, 42 U. S. C. § 2000e-5(e), alleging the unlawful employment practices as described hereinabove and naming TWA and the Union as charged parties. Within ninety (90) days prior to the filing of this Complaint, each of the Plaintiffs herein received from the EEOC notices of their right to sue the Union and TWA in a United States District Court on the basis of said Charges of Discrimination, in compliance with and pursuant to Title VII, 42 U. S. C. § 2000e-5(f).

Wherefore, Plaintiffs respectfully pray that this Court, upon hearing, enter the following orders in accordance with the provisions of Title VII, 42 U. S. C. § 2000e-5(g) and (k):

(a) Declaring the rights of the parties and finding that the aforementioned conduct of Defendants was and is violative of Title VII, 42 U. S. C. § 2000e-3(a);

(b) Entering preliminary and permanent injunctions enjoining and prohibiting Defendants from engaging in any conduct with respect to Plaintiffs and the class which is violative of Title VII;

(c) Ordering Defendants by mandatory injunction to take such action as is deemed necessary to eliminate the effects of said unlawful conduct and to assure that such unlawful conduct does not continue to affect the employment rights and opportunities of Plaintiffs and the class, including but not limited to

(i) Ordering Defendants to offer all class members immediate placement on the preferential hiring list, as set out in the settlement agreement, regardless of whether or not they have signed, or agree to sign, any waiver of their rights including the rights to seek further relief in the original class action, and

(ii) Ordering Defendants to declare null and void all waivers heretofore executed by class members, and to

refrain from requesting or accepting any further waivers of rights from any class members;

(d) Ordering Defendants to provide monetary relief including back pay to any of the Plaintiffs or class members for losses sustained as a result of Defendants' violation of Title VII, 42 U. S. C. § 2000e-3(a);

(e) Ordering Defendants to grant other affirmative relief to Plaintiffs and the class, such as accrual of seniority and those job perquisites which any of the Plaintiffs or class members may have been denied by reason of Defendants' unlawful conduct in violation of Title VII, 42 U. S. C. § 2000e-3(a);

(g) Declaring that the relief granted herein is solely to make Plaintiffs and the class whole and protect them from further damages and disadvantages arising out of Defendants' violation of the reprisal provisions of Title VII, 42 U. S. C. § 2000e-3(a), and declaring that the award of such relief as is deemed necessary and proper in this action shall in no way prejudice Plaintiffs and the class from seeking additional and supplementary relief in the original class action or other actions filed or to be filed against Defendants, or either of them, for unlawful conduct with respect to Plaintiffs and the class other than that alleged as the basis for relief in this action;

(h) Ordering Defendants to pay Plaintiffs and the class punitive damages; and

(i) Ordering such other and additional relief as this Court deems necessary or proper.

Arnold I. Shure
Ten South LaSalle Street,
Room 1100
Chicago, Illinois 60603
(312) 346-4537
Charles Pressman
33 North Dearborn Street,
Room 707
Chicago, Illinois 60602
(312) 372-6475
By Arnold I. Shure, one of the attorneys for Plaintiffs Anne B. Zipes and Frances M. Swift

Dated: July 22, 1974

Rec. No. 5

* * (Caption—No. 74 C 2063) * *

MOTION TO DISMISS

(Filed September 19, 1974)

Defendant, Trans World Airlines, Inc., by its attorneys, Gardner, Carton, Douglas, Chilgren & Waud, moves the Court to dismiss this action for the following reasons:

1. The complaint fails to state a claim upon which relief can be granted:

2. The issue in this case has previously been determined adversely to the plaintiffs in a prior action and the plaintiffs are barred by the principles of *res adjudicata* and collateral estoppel from relitigating the issue;

3. The issue is involved in a prior pending action between the same parties; and

4. Plaintiffs do not have standing to raise the issue involved in the complaint.

Wherefore, defendant Trans World Airlines, Inc. moves the Court to dismiss this action on all or any of the above enumerated grounds.

Trans World Airlines, Inc.
By /s/ Laurence A. Carton
One of Its Attorneys

Rec. No. 13

* * (Caption—No. 70 C 2071) * *

MOTION TO AMEND ANSWER

(Filed September 16, 1974)

Defendant, Trans World Airlines, Inc., by its attorneys, Laurence A. Carton and Joseph P. Carr, moves the Court, pursuant to Rule 15(a), for the entry of an order to permit defendant to amend its answer to the complaint instanter by adding the following third affirmative defense:

Third Affirmative Defense

14. Plaintiffs and members of the class failed to file charges with the Equal Employment Opportunity Commission within 180 days after the alleged unlawful employment practices occurred with the result that their claims are barred by the statute of limitations under Section 706(e) of Title VII.

Respectfully submitted,

/s/ Laurence A. Carton
/s/ Joseph P. Carr
Attorneys for Defendant Trans World Airlines, Inc.

Rec. No. 13

* * (Caption—No. 70 C 2071) * *

MEMORANDUM OPINION AND ORDER

(Entered September 16, 1974)

This matter arises on the motions of plaintiffs Patricia A. Santini and Pamela J. Dailing and respondent-appellant in the prior appeal of these actions, Anne B. Zipes, (the movants) to be appointed as representative class plaintiffs and to appoint Arnold I. Shure and Charles Pressman as counsel to represent the plaintiff class in this case. This case is before the Court on remand from the United States Court of Appeals for the Seventh Circuit in *Air Line Stewards and Stewardesses Association, Local 550, et al,* v. *American Airlines, Inc., et al.,* 490 F. 2d 636 (7th Cir. 1973), *cert. denied,* ____ U. S. ____, 94 S. Ct. 2406 (1974).

In reversing a previously entered judgment order approving settlement of this class action, the Seventh Circuit held:

> "The actions brought against the two airlines [American Airlines and Trans World Airlines] should have been, and should henceforth be treated as (b)(3) class actions with the attendant right of a class member, for a reasonable interval, to exclude herself or appear through counsel pursuant to Rule 23(c)(2)." 490 F. 2d at 643.

Thus, the Court of Appeals unequivocally directed this Court to proceed with these actions as (b)(3) class actions. The court further stated that:

> "[o]n remand the district court should: (1) Permit one or more of the named plaintiffs or other members of the class in each action to replace ALSSA [Air Line Stewards and Stewardesses Association Local 550, TWU, AFL-CIO] as the representative of the class. If it should appear desirable for adequate representation of all class members, subclasses, each with its own representative, may be created.
>
> "(2) Require that notices, pursuant to Rule 23(c)(2) be sent, offering to each member of the class the opportunity to exclude herself from the class or appear through counsel.

"(3) Proceed with the litigation unless settlement as to some or all issues is agreed on by the appropriate parties, and approved, on notice, by the court." 490 F. 2d at 643-44.

Pursuant to the mandate of the Court of Appeals and the requirements of Rule 23(a)(3) and (4), this Court will consider in determining whether to appoint the movants class representative whether the claims of the movants are typical of those claims of the class as a whole and whether the movants will fairly and adequately represent the interests of the class. The past conduct of this litigation demonstrates that the movants fulfill both requirements. Each of the movants alleges that she was a TWA stewardess who left her employment with the airline by reason of her pregnancy after July 2, 1965, the effective date of the Civil Rights Act of 1964. Additionally, each movant is seeking the same type of relief as the class, including reinstatement, back pay, and accrued seniority. As to the adequacy of representation criterion contained in Rule 23(a)(4), throughout the course of this litigation movants have proven that they will vigorously and adequately protect the rights of members of the class. Movants' counsel have also demonstrated their qualifications to competently prosecute the further course of this litigation.

The defendant airline has asserted that this litigation is not appropriately brought as a class action because the requirements of Rule 23(b)(3) are not fulfilled; the airline maintains that common questions of law and fact do not predominate over any questions affecting only individual members of the class. The view of the Court of Appeals is obviously to the contrary and the question whether this case is to be treated as a (b)(3) class action is a closed issue.

TWA has also asserted that the movants' claims might not be typical because (1) if one of the movants failed to file a complaint with the EEOC, she may be barred from being a class representative and (2) if a movant failed to protest her

termination, her action may be barred. The defendant airline also asserts that conflicts over seniority create conflicts of interest which preclude the movants from representing the class. Therefore, the defendants propose that this Court defer ruling on the movants' motions until after pretrial discovery reveals the nature of the class, the characteristics of adequate representatives, and whether there is a need for subclasses and separate counsel. The Court of Appeals, however, directed that this Court proceed in the first instance with a choice of class representatives. Thus, at this juncture, despite the possibility that discovery may reveal the need for subclasses or alternative class representatives, the movants, consistent with the mandate of the Court of Appeals, have fulfilled their initial burden of proving typicality and adequacy entitling them to be designated as class representatives. Of course, if during discovery there are developed facts which demonstrate the need for subclasses or the naming of other counsel (or even make a (b)(3) class action inappropriate), Rule (23)(c)(1) allows this Court to take appropriate action.

For these reasons, the motion to appoint Anne B. Zipes, Patricia A. Santini, and Pamela J. Dailing class representatives in 70 C 2071 is granted. The motion to appoint Arnold I. Shure and Charles Pressman class counsel in 70 C 2071 is also granted.

Additionally, plaintiffs' counsel shall prepare and submit to the Court within twenty (20) days of the date hereof proposed notices to be sent to members of the class pursuant to Rule 23(c)(2).

It Is so Ordered.

Entered:

/s/ R. W. McLaren
United States District Judge

Dated: September 16, 1974

Rec. No. 10

* * (Caption—No. 74 C 2063) * *

AMENDED MOTION TO DISMISS

(Filed October 2, 1974)

Defendant, Air Line Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO, by its attorneys, Gilbert Feldman and Barbara Hillman, moves the Court to dismiss this cause on the following grounds.

1. The complaint fails to state a claim upon which relief can be granted.

2. The claim alleged in Plaintiff's Complaint has been determined in cause No. 70 C 2071, a prior action between the same parties and Plaintiffs are therefore estopped from relitigating the claim under the doctrine of *res adjudicata;* and

3. The claim raised on Plaintiff's Complaint involves subject matter, being litigated in cause No. 70 C 2071, a prior pending action between the same parties.

Respectfully submitted,

Kleiman, Cornfield and Feldman
/s/ Gilbert Feldman
Gilbert Feldman

Rec. No. 17

* * (Caption—No. 70 C 2071) * *

MOTION

(Filed October 10, 1974)

Now comes Patricia A. Santini, Pamela J. Dailing and Anne B. Zipes by their attorneys and submit herewith a proposed Rule 23 (c)(2) *Notice to Class.*

Respectfully submitted,

/s/ Charles Pressman
Charles Pressman, One of the Attorneys for Plaintiffs

* * (Caption—No. 70 C 2071) * *

NOTICE TO CLASS

Patricia A. Santini, Pamela J. Dailing and Anne B. Zipes have been appointed class representatives in a legal action in the United States District Court for the Northern District of Illinois, Eastern Division against Trans World Airlines, Inc. ("TWA") alleging that TWA violated Title VII of the Civil Rights Act of 1964 by engaging in unlawful employment practices continuously from July 2nd, 1965 whereby continued employment as flight cabin attendants was prohibited because of pregnancy.

On the 16th day of September, 1974, the Court determined that Patricia A. Santini, Pamela J. Dailing and Anne B. Zipes were the proper representatives for a class of persons consisting of the following: All female persons employed as flight cabin attendants whose employment with TWA was terminated on or after July 2nd, 1965 for reason of pregnancy.

This notice is being sent to you in the belief that you may be a member of the class of plaintiffs whose rights may be affected

by this litigation. This notice is not to be understood as an expression of any opinion by this Court as to the merits of any of the claims or defenses asserted by either side in this litigation, but is sent for the sole purpose of informing you of the pendency of this litigation so that you may make appropriate decisions as to steps you may wish to take in relation to this lawsuit.

TWA has denied liability.

Therefore, Take Notice:

1. If you have been a flight cabin attendant employed by TWA whose employment was terminated on or after July 2nd, 1965 because you became pregnant:

(a) The court will exclude you from the class represented by Patricia A. Santini, Pamela J. Dailing and Anne B. Zipes if you request exclusion in writing addressed to the Clerk of the U. S. District Court, 219 South Dearborn Street, Chicago, Illinois, on or before the ____ day of ____, 19___.

(b) If you do not request exclusion from the class by the ____ day of _____, 19___, you will be included in such class and any judgment, whether favorable, or unfavorable, will be binding upon you.

2. If you do not request exclusion from the class but prefer in connection with your individual claim to be represented by your own counsel rather than Patricia A. Santini, Pamela J. Dailing and Anne B. Zipes acting through counsel appointed by the Court, you may enter an appearance through your counsel but not later than the ___ day of ____, 19___.

Dated this ___ day of ____, 19___.

_____

Clerk

Rec. No. 18

* * (Caption—No. 70 C 2071) * *

ORDER

(Entered October 10, 1974)

Form of notice is filed and agreed to as to form and is approved by the court.

/s/ McLaren

Rec. No. 28

* * (Caption—Nos. 70 C 2069, 70 C 2071) * *

ORDER

(Entered November 29, 1974)

On oral motion of representatives of the plaintiff classes in cases numbered, 70 C 2069 and 70 C 2071, It Is Hereby Ordered and Decreed for each of the actions listed in the caption hereto that:

I. CONSOLIDATION

Cases numbered 70 C 2069, 70 C 2071, 72 C 498 and 74 C 2762 having been consolidated for purposes of pretrial proceedings and discovery by order of court entered November 18, 1974, shall be consolidated with case number 74 C 2063 for the same purposes.

II. COUNSEL

A. Charles Pressman and Arnold I. Shure are hereby designated as lead counsel in these cases with the authority to receive and forward all notices to the court and all counsel, to notify the court of responses and actions regarding pretrial discovery and pretrial pleadings, and to call conferences of plaintiffs counsel to consider action.

B. Lead counsel shall have the primary responsibility to initiate and conduct discovery, to prepare, review and file notices and memoranda in these consolidated actions and to act as spokesman for plaintiffs at future pretrial conferences and other hearings. Lead counsel should when possible consult with other attorneys for plaintiffs in efforts to minimize duplication and to reasonably accommodate scheduling of matters before the court. Counsel for other plaintiffs may participate in discovery and, after notice to lead counsel, may file supplementary memorandum, conduct nonduplicative supplementary discovery and file supplemental memoranda to the extent that any different interests of the other plaintiffs require such supplementation.

C. All documents produced by defendants in connection with discovery shall be available for other attorneys for plaintiffs who shall have the right to examine and copy such documents.

D. Defendants' counsel may rely on agreements with lead counsel as to matters of scheduling and discovery which is not supplemental to lead counsel discovery. All such agreements shall be binding on all counsel for plaintiffs in class actions unless otherwise ordered by this court; provided however, that lead counsel shall take such reasonable steps as may be appropriate to endeavor to accommodate scheduling of all counsel.

III. REPORT

E. Lead counsel shall report to this Court on Monday, December 2nd, 1974 at 10:00 A.M., as to the status of these consolidated cases.

Enter:

/s/ R. W. McLaren

Judge

Dated: November 25, 1974.

Rec. No. 23

* * (Caption—Nos. 70 C 2069, 70 C 2071) * *

MEMORANDUM OPINION AND ORDER

(Entered November 20, 1974)

These actions are class action Title VII equal employment sex discrimination cases challenging the practice of Trans World Airlines and American Airlines of terminating the employment of pregnant stewardesses. The cases are now before the Court on defendants' motions to amend their answers to include the affirmative defense of the statute of limitations.[1] Plaintiffs oppose these motions, asserting that (1) defendants have been guilty of unreasonable delay in asserting this defense, and (2) justice does not require defendants' being granted leave to amend because it would be unduly prejudicial to plaintiffs.

The following facts are relevant to disposition of these motions:

The complaints were filed on August 18, 1970, and defendants' answers were submitted to the Court on September 30, 1970.[2] There were no further proceedings in Court until July 16, 1971, when a settlement agreement was filed. But in the interim the airlines and the union amended their labor agree-

[1] The statute of limitations for Title VII actions is contained in 42 U. S. C. § 2000e-5e. At the time these actions were filed, the statute provided that to sustain an action under Title VII a charge must have been filed with the Equal Employment Opportunity Commission within 90 days after the alleged unlawful employment practice occurred. The time limit was increased to 180 days by the amendment of March 24, 1972 (P. L. 92-261, § 4).

[2] Defendants' answers contained two other affirmative defenses: first, that defendants' conduct was based upon a continuing policy which was a "bona fide occupational qualification reasonably necessary to the normal operation' of defendant's business within the meaning of 42 U. S. C. § 2000-2(e)," and the second, that the policy is "pursuant to a 'system which measures earnings by quantity and qualify or production' within the meaning of 42 U. S. C. § 2000e-2(h)."

ments to eliminate pregnancy as a ground for termination, and negotiated the settlement agreement. The hearing on that agreement began on March 10, 1972; the intervening delays was caused by the effort of the EEOC to intervene, including its appeal to the Seventh Circuit. On April 11, 1972, several plaintiffs filed their notices of appeal from the order approving the settlement agreement. Their appellants' brief was not filed until February 5, 1973. The Seventh Circuit decision reversing the order approving settlement was issued on December 23, 1973,[3] the Supreme Court denied a writ of certiorari on May 13, 1974. The case was assigned to this Court on July 11, 1974. TWA and American then filed their motions to amend the answers on September 11, 1974, the date set by the Court for a status report.

F. R. Civ. P. 15(a) provides that leave to amend "shall be freely given when justice so requires." The Supreme Court in *Forman* v. *Davis,* 371 U. S. 178, 182 (1962) held that this mandate is to be heeded, stating:

> "In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.'"

In the instant actions, plaintiffs could be unduly prejudiced by amendment. The absence of the defense of limitations could

[3] In *Air Line Stew. & S. Ass'n, Local 550* v. *American Airlines,* 490 F. 2d 636 (7th Cir. 1973), the court of Appeals reversed the settlement order previously entered in these actions. The court held that the Union could not act as representative of the individual stewardesses terminated because of conflict of interest in the Union over such matters as seniority. Moreover, the court determined that these actions should proceed as R. F. Civ. P. 23(b)(3) class actions instead of F. R. Civ. P. 23(b)(2) class actions.

have been considered by the present plaintiffs when they rejected the union-airlines settlement agreement and appealed the orders approving settlement to the Seventh Circuit. At that time plaintiffs could reasonably believe that the pleadings were completed especially considering the class allegations contained in these actions. Notice of the proposed settlement to members of the classes invited "any interested person or attorney" to inspect "all pleadings and other documents in the action." None of the documents apparently contained any notice of the statute of limitations defense although the Union's attorney did mention the possibility of the defense during oral hearings on the settlement agreement.

Plaintiffs also argue that even if undue prejudice cannot be shown, defendants should not be allowed to amend because they have been guilty of undue delay in asserting the limitations defense. Defendants justify their delay in filing the defense on three grounds: (1) legal uncertainty about availability of the defense; (2) active participation in the aborted settlement negotiations and (3) no district court judge had jurisdiction over the actions while the various appeals were pending.

Defendants assert that when the complaints were filed in 1970, there had been few decisions construing the limitations problems inherent in Title VII class actions. It is important to note, however, that defendants do not claim that the limitations language of the statute was ambiguous, nor do defendants assert that there were no cases to rely on for guidance. In fact, defendants cite a 1969 case, *Burney* v. *North American Rockwell,* 302 F. Supp. 86 (C. D. Cal. 1969), to support their substantive point that the Title VII statute of limitations affects unnamed class plaintiffs as well as named or individual plaintiffs.

Moreover, defendants make no showing how these proceedings could have prevented them from making a motion to the Court to amend their answers, particularly when defendants

original answers contained two other affirmative defenses. Additionally, the existence of this defense, properly plead, should have been a factor in defendants' posture during this stage of the litigation. That defendants failed to fully investigate the legal status of plaintiffs' claims at that time only demonstrates that defendants may not have completely prepared during settlement negotiations, not that the negotiations themselves prevented defendants from presenting their legal arguments to the Court.

Defendants' third argument that the pending appeals prevented them from amending also seems inequitous. While it is true that for substantial periods since filing in 1970 no district court judge had jurisdiction over these cases, defendants do not satisfactorily explain why when the district court did have jurisdiction (from filing in 1970 to April 1972), they made no motion to amend.

Defendants' delay in pleading the defense of limitations may well ultimately constitute a waiver of the defense; at this juncture, however, the Court is not convinced to a legal certainty that pleading of the defense shall not be allowed. Under the liberal pleading rules contained in Rule 15, defendants should be entitled to prove through discovery techniques or otherwise that the plaintiffs suffered no prejudice or that the delay in amendment was excusable. Defendants' motion to amend their answers is granted.[4]

IT IS SO ORDERED.

Entered:

/s/ R. W. McLaren
United States District Judge

Dated: November 18, 1974.

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[4] Of course, this disposition of defendants' motions is not intended to express any ultimate views on the waiver or laches issues or the substantive applicability of the 180 day statute of limitations.

Rec. No. 77

* * (Caption—No. 70 C 2069, 70 C 2071) * *

MOTION FOR ORDER EXCLUDING CERTAIN PERSONS FROM CLASS FOR LACK OF SUBJECT-MATTER JURISDICTION

(Filed December 16, 1975)

Defendants, American Airlines, Inc. and Trans World Airlines, Inc. move the Court to enter an order excluding from the plaintiff class each person formerly employed by a defendant as a flight cabin attendant (a) whose employment was terminated before March 1, 1970 because of pregnancy and (b) who did not file timely charges complaining of the termination with the Equal Employment Opportunity Commission on or before May 31, 1970. As shown in a memorandum filed in support of this motion, each such person should be excluded because of failure to comply with the requirements for jurisdiction of the subject matter imposed by Title VII of the Civil Rights Act of 1964 under which the plaintiffs seek recovery.

/s/ Laurence A. Carton
/s/ Joseph P. Carr
Attorneys for American Airlines, Inc. and Trans World Airlines, Inc.

* * (Caption—No. 70 C 2071) * *

TRANSCRIPT OF PROCEEDINGS had in the above-entitled cause before the HON. RICHARD W. MC LAREN, one of the judges of said court, sitting in his courtroom in the United States Court House at Chicago, Illinois, on the 16th day of December, A.D. 1975, at the hour of 10:00 o'clock a.m.

PRESENT:

Mr. Pressman,
Mr. Carton.

THE CLERK: 70 C 2071, In re Consolidated Pretrial Orders in the Air Line cases.

Motion for an order excluding certain persons from the class for lack of subject matter jurisdiction.

THE COURT: Can I ask how in the world a motion like this can come five years after the filing of the case?

MR. CARTON: Our position on that, your Honor, is that the matter of the jurisdictional prerequisite was discussed at length in the hearing before Judge Perry. That was on settlement. Just as soon as your Honor acquired jurisdiction, we brought before your Honor a defense. We received an opinion from your Honor indicating that there was a possibility of waiver. We were then deluged with discovery problems which plaintiffs put upon us.

Also, until the Wetzel case was handed down in January of 1975, we did not feel that the matter was clear, your Honor.

We have continued on discovery, as you know. We have had problems with respect to briefs and really until we had the refusal of certiorari in the Supreme Court, until we had just a month ago a case which said that a grievance did not toll the statute, we did not feel confident in going forward in the face of your order.

MR. PRESSMAN: Your Honor, I beg to differ with Mr. Carton. The issue has only come before any court that has ever considered this case as a statute of limitations issue, never a jurisdictional issue, that being the order, your Honor, which is attached to our brief on the motion for summary judgment—I believe it is November of '74—which refers to the statute of limitations for Title 7 actions contained in 42 U. S. C. 2000(e)(5).

You have always been led to believe by the parties on both sides here that we are dealing with a statute of limitations

problem which only affects each plaintiff individually and it is inexplicable as to why up until today we have never been confronted with anything like a jurisdictional claim.

THE COURT: I agree with you, and I can't understand it. My normal reaction would be to deny the motion and move along but you tell me it is jurisdictional and I have no right to do that.

MR. PRESSMAN: May I suggest the following: I don't believe it is jurisdictional in the Seventh Circuit. I believe that some courts have used language like that, they have used jurisdictional language while at the same time referring to the statute of limitations. In fact, in counsel's brief which he files, although he calls it jurisdiction in at least four or five places that I have noted very briefly, it is called statute of limitations in the brief. It is on page 13, for instance, where he quotes from a case called Olson v. Rembrandt Printing. You will notice the second paragraph of the quotation:

> "As we noted in Richard, to continue to construe loosely continuing discrimination would undermine the theory underlying the statute of limitations."

Again on page 11 he quotes Rue v. Philadelphia Enquirer citing Wetzel and he says:

> "Plaintiffs bringing their class action may not make use of the class action to toll the statute of limitations."

In the brief it is in four or five different places. Mr. Carton refers to this very thing which he calls jurisdictional as the statute of limitations.

On page 10, quoting from the Wetzel case, it says in this quotation:

> "Accordingly Wetzel says this tolls the statute of limitations for all members of the class."

Mr. Carton—

THE COURT: I don't think we can argue it out now. Mr. Carton has filed a brief in support of his motion and what would you like, a couple of weeks to respond?

MR. PRESSMAN: I would like to make a suggestion, your Honor, to save everybody some work here.

We have before you a summary judgment on the question of liability. After that is decided, whether it is decided in my favor or Mr. Carton's favor, there will be points of law to be cleared up.

I would suggest, as I understand that it will be ruled on shortly, I would suggest that after that is ruled on, we get together and decide what all of the issues that remain in the case are and then decide how we are going to go on this issue if we have to go at all.

You will note, your Honor, that Mr. Carton is not suggesting that this Court doesn't have jurisdiction of the entire matter.

THE COURT: I understand that.

MR. PRESSMAN: It is just individual claims. So the liability question still remains in the case even though he has filed a brief on jurisdiction.

So we must have a decision on that in any event and I would suggest that since we are so far along on that, we get a ruling on it so that we know where we are and then we will decide whether this has to be briefed and to what extent.

THE COURT: You would continue his motion until after the decision on the summary judgment motion?

MR. PRESSMAN: Yes, your Honor, I would, and for another reason:

If we are going to have a hearing—if we are going to have to get into this issue, there may be some factual issues raised here

and so on. I can see in reading it quickly last night that it raises some and I don't know to what extent at this moment.

So I think in terms of judicial economy, it would be much better to get as quickly as possible under the circumstances a ruling on that.

THE COURT: Do you have any comment on that, Mr. Carton?

MR. CARTON: I am not arguing, your Honor, the priority of their motion over our motion. We did feel that it was important to have this question, this problem before your Honor before a decision was made on the motion for summary judgment, but if you—

THE COURT: Of course this would affect only a relatively small proportion of the people on the plaintiffs' side, as I understand it.

Is that correct?

MR. CARTON: There are still, I think, a substantial number.

For example, I figured out that there were 64 American stewardesses that might still be members of the class.

MR. PRESSMAN: No, your Honor.

THE COURT: That would be affected by this motion?

MR. CARTON: That would remain members of the class if you granted the motion.

MR. PRESSMAN: Your Honor, that is not—

THE COURT: You mean would be knocked out?

MR. CARTON: I think that we have a problem there because we are not clear as to what the class should be.

In other words, we have not attacked the individual people in the class at this point and we have collected file jackets for approximately 300 American stewardesses. So that means

possibly that you would have as many as 240 of those knocked out.

THE COURT: So this might be the greater number and in going ahead and deciding the summary judgment motion, and so on, we might be attending the tail instead of the dog.

MR. CARTON: That's what I feel.

MR. PRESSMAN: Your Honor, may I reply to that?

Mr. Carton has got it just backwards. As long as we are talking about tails, the fact of the matter is that if this motion—even if his motion were granted, I think that no more than 10 per cent of the American Air Lines class would be knocked out and perhaps even less than 10 per cent. Mr. Carton simply doesn't understand, I think, the question of notice, the question of who may file with the EEOC for a class and there are people who have filed with the EEOC who are not at this moment class representatives back as early as 1967 in which case we have a very, very—we have almost the entire class here and I am very confident, your Honor, that in the case of American the class will be very near the total number of file jackets, and, as a matter of fact, will exceed the number of file jackets which Mr. Carton has presented, and in the case of TWA it will be somewhat less.

THE COURT: All right. Mr. Carton has indicated no great opposition to the procedure you suggest so we will continue his motion until after the disposition of the summary judgment motion at which time it will be taken up and there will be a briefing schedule established.

Incidentally, Mr. Carton, I notice that you have got a 24-page brief here. Now we have got a 15-page rule. I like to have people come in and ask ahead of time to have leave to file an over-length brief.

MR. CARTON: I am sorry, your Honor.

THE COURT: I will grant you leave to file the over-length brief and the other side can have an equal length of brief for its answer.

MR. CARTON: For the record, the plaintiff Alsa I believe has already stated its position. We [they] do not choose to seek permission to file a brief on this question.

THE COURT: All right.

MR. CARTON: Thank you, your Honor.

MR. PRESSMAN: Thank you.

Rec. No. 81

* * (Caption—Nos. 2069, 2071) * *

MOTION FOR ORDER ESTABLISHING BRIEFING SCHEDULE ON JURISDICTION MOTION

(Filed March 16, 1976)

On December 15, 1975, defendants American Airlines, Inc. and Trans World Airlines, Inc. filed a motion for the entry of an order excluding from the plaintiff class all flight attendants (a) whose employment was terminated before March 1, 1970 because of pregnancy and (b) who failed to comply with the provision of the Civil Rights Act of 1964 requiring a charge complaining of such termination to be filed with the EEOC within ninety days thereof. Defendants filed a memorandum in support of their motion.

On December 16, 1975, Judge McLaren entered the following minute order:

> Leave is hereby granted to the defendant to file a brief in excess of 15 pages. The motion for the exclusion of certain persons of the class for lack of subject matter jurisdiction is entered and continued until after the court rules on plaintiffs motion for summary judgment and at that time a briefing schedule will be established re: the motion to exclude.

It has been held in many cases that once an issue of jurisdiction has been raised, it should be disposed of before any consideration of the merits. In *Safeguard Mut. Ins. Co.* v. *Commonwealth of Pa.*, 372 F. Supp. 939 (E. D. Pa., 1974) the court said (p. 946):

> The authority of a judge to reconsider a previous ruling of a prior judge, sitting on the same case in the same Court, is well settled. Helvering v. Hallock, 309 U. S. 106, 60 S. Ct. 444, 84 L. Ed. 604 (1940); TCF Film Corporation v. Gourley, 240 F. 2d 711 (3rd Cir. 1957); Ward v. Louisiana Wild Life and Fisheries Commission, 224 F. Supp. 252 (E.D. La. 1963).
>
> We think this principle is particularly sound with respect to ruling on jurisdictional questions. Moreover, when a Federal District Court decided that jurisdiction is lacking, at any time after a suit is brought, it has no authority to proceed further with an adjudication of the issues on their merits; the Court must dismiss the suit.

See *Joyce* v. *U. S.*, 474 F. 2d 215, 219 (3 Cir. 1973); *Bell* v. *United States*, 31 FRD 32, 36 (D., Kansas, 1962).

If defendants' jurisdiction motion is granted,* the scope of the litigation would be changed considerably. Attached is an affidavit for each airline. They show that out of 439 possible class members in the TWA case, only 17 would remain within the jurisdiction of the court if the motion is granted. Similarly, in the American Airlines case, out of 312 possible class members there would remain 74 class members. As shown in the exhibits accompanying the affidavits, the claims of many of these remaining "class members" may be subject to disallowance.

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* Defendants' motion is supported by the recent decision of the Seventh Circuit in *Evans* v. *United Airlines*, ____ F. Supp. ____, 11 EPD ¶ 10665 (1976), a similar case involving discharge of a stewardess.

Defendants respectfully request the court to resolve the issue of jurisdiction prior to a resolution of the motion for summary judgment, and to establish a briefing schedule on the jurisdiction motion.

/s/ Laurence A. Carton
/s/ Joseph P. Carr
Attorneys for American Airlines, Inc. and TransWorld Airlines, Inc.

AFFIDAVIT

STATE OF ILLINOIS
COUNTY OF COOK } ss.:

Doris Owen, being first duly sworn, on oath deposes and says:

1. Affiant is employed by Trans World Airlines, Inc. (TWA) as a supervisor of flight attendants and is stationed at its Los Angeles base. Since 1954 she has held various TWA management positions, all of which involved the use of and familiarity with personnel policies and records relating to flight attendants.

2. On July 8, 1975, there was filed in this Court, Case No. 70 C 2071, my affidavit dated July 2, 1975. Attached to said affidavit was a list of former TWA flight attendants whose employment was terminated subsequent to July 2, 1965, because of pregnancy related reasons as defined in plaintiffs' first set of interrogatories. That list was prepared by me from TWA records as described in said affidavit. In paragraph 4 of said affidavit I said that it included the names of all possible class members to the best of my knowledge.

3. During the period February 24-26, 1976, I reviewed all personnel records of TWA flight attendants stored at the court designated depositary at Room 4600-First National Plaza, Chicago, including files and kardexes. I telephoned the TWA Kansas City archives to verify questionable dates. I then prepared attached list (Exhibit A) containing all the names on the above mentioned list. I have made inquiries of those in charge of TWA flight attendant records and believe that attached list constitutes all of the possible class members who have been brought to the attention of the Company and for whom it has records. The list shows for each name the last day worked, and the reason for removal from flight attendant status, all according to the records.

/s/ Doris Owen
Doris Owen

Subscribed and sworn to before me this 26th day of February, 1976.

/s/ Elizabeth M. Wright
Notary Public

Exhibit A

LIST OF TWA FLIGHT ATTENDANTS

(70 C 2071)

Name	Last Day Worked	After 3/1/70	Reason for Removal From Flight Attendant Status	Comment
Jean Adams	2-13-69		Resignation	Adoption
Kendra Adams	6-30-67		Pregnancy	
Sarah L. Adams	7-22-69		Pregnancy	
Elizabeth Ahlers	3-25-66		Pregnancy	
Noela Aldort	6-20-68		Pregnancy	
Judith A. Anderson	9-12-66		Pregnancy	
Carolyn S. Anderson	2- 1-66		Pregnancy	
Suzanne M. Andrews	4-15-68		Pregnancy	
Kora A. Arnell	4- 1-68		Pregnancy	
B. Vivien Ambler	6-21-68		Resignation	Personal
Rachel V. Atkins	11-29-67		Pregnancy	
Judith V. Atwood	7-28-69		Pregnancy	
Deanne E. Avant	11- 1-67		Pregnancy	
Roberta Avery	12-22-69		Pregnancy	
Pauline H. Bacchi	1-16-69		Resignation	To be a full time housewife
Karen J. Bailey	12- 9-65		Pregnancy	
Barbara Baldwin	2-25-65		Pregnancy	
T. S. (Margaret) Ball	10-23-66		Pregnancy	
Sharon P. Bands	8-16-68		Pregnancy	
Sandra Barnett	3-26-69		Resignation	Unknown reason
Priscilla Barron	12-18-66		Pregnancy	
Karen L. Bartholio	9- 2-66		Resignation	Unknown reason
Patricia K. Batza	2-15-67		Pregnancy	
Sherrill A. Beaman	12-20-68		Pregnancy	
Tamara Beeler	5- 7-70	*	Pregnancy	Returned as F/A from maternity leave 4/6/71
Linda J. Banjamin	6-22-66		Resignation	Unknown reason
Kathleen B. Bergmann	12-11-68		Pregnancy	
Sandra Berkowicz	2-18-69		Pregnancy	
Audrey Bird	2- 5-69		Pregnancy	
Mary Biver	7-10-68		Pregnancy	
Barbara Black	4-22-66		Pregnancy	
Gretchen McCurdy Boardman	5- 2-67		Pregnancy	
Rita Boaz	6- 2-68		Pregnancy	

Name	Last Day Worked	After 3/1/70	Reason for Removal From Flight Attendant Status	Comment
Arlene Bodney	4-25-69		Pregnancy	
Mary Boehmer	12-23-68		Pregnancy	Concealment
Mary Bohn	3-31-66		Voluntary termination	Unknown reason
Ethel Bonar	9-17-67		Pregnancy	
Sharon Bongard	5-21-67		Pregnancy	
Connie Bowers	9-30-68		Personal	Management employee
Kathleen Bowery	2-12-67		Pregnancy	
Karla Boynton	3-26-69		Pregnancy	
Patricia Brandenburg	11-17-69		Pregnancy	
Jane Bregstein	4- 1-69		Pregnancy	
Carol Brent	6-19-67		Pregnancy	
Jacqueline Bridge	12-13-66		Pregnancy	
Deborah A. Brown	3-23-67		Pregnancy	
Janet Reibolt Brown	No information—See 7/2/75 affidavit of Doris Owen			
Diana K. Brown	10-26-66		Pregnancy	
Saundra E. Brown	1-19-70		Discharged	Poor performance
Janett Buell	2-14-65		Pregnancy	
Sharon Buell	4- 6-68		Pregnancy	
Denyse Burns	7-23-66		Pregnancy	
Janice Buvinghausen	3-15-67		Pregnancy	
Irene Cain	11-15-69		Pregnancy	
Sydney R. Cain	3-17-69		Pregnancy	
Helen Camerlingo	9-30-66		Pregnancy	
Jean N. Carlino	7-28-69		Pregnancy	
Christine Carlson	8- 5-68		Pregnancy	
Joan Carlson	7- 2-65		Pregnancy	
Linda Catalina	9- 3-68		Pregnancy	
Nancy Chapa	3- 5-69		Resignation	Marriage
Martha-Chapman	9-27-67		Pregnancy	
Barbara Chevigny	10-20-67		Pregnancy	
Joan Childress	11-12-65		Pregnancy	
Hope Clark	1-14-68		Pregnancy	
Kendall Clarke	4- 1-68		Pregnancy	
Karen Clark (Indovina)	8-16-68		Pregnancy	
Ann Clay	4- 7-69		Pregnancy	
Susan Closkey	3-31-66		Pregnancy	
Angela Cody	10- 7-66		Pregnancy	
Karin C. Cole	5-24-66		Pregnancy	
Carole Coleman	11- 1-65		Pregnancy	
Janet Conaty	4-13-69		Pregnancy	
Arleen Condrin	5-28-69		Pregnancy	
Carol Conrad	4-15-67		Pregnancy	
Dorothy Cooksey	3-17-68		Pregnancy	

Name	Last Day Worked	After 3/1/70	Reason for Removal From Flight Attendant Status	Comment
Neva Cotter	3- 2-70		Pregnancy	Granted maternity leave
Barbara Court	11-21-68		Pregnancy	
Felicia Coyne	4-15-68		Pregnancy	
Lorna Craig	7-24-67		Pregnancy	
Helen Shea Crean	4-10-64		Pregnancy	
Carol Crombie	4-10-69		Pregnancy	
Diana Cross	9-13-68		Pregnancy	
Rosemary Cunningham	7-15-66		Pregnancy	
Julie Cuomo	11-25-67		Pregnancy	
Alice Curran	5-13-68		Pregnancy	
Jerrlea Currigan	1- 3-67		Pregnancy	
Kendall Dahl	3- 5-66		Pregnancy	
Pamella Dailing	2-22-69		Pregnancy	
Carol Dargan	9- 6-66		Pregnancy	
Vicky Davidson	9-23-68		Pregnancy	
Rita Davis	7-31-67		Pregnancy	
Marion Day	1-24-65		Pregnancy	
Connie Debernardi	12-29-65		Pregnancy	
Margaret (DeKeyser) Tozer	5- 1-67		Pregnancy	
Virginia Dalia	6- 6-68		Pregnancy	
Sandra DeMoss	10- 5-65		Pregnancy	
Judy Dempsey	7-11-69		Pregnancy	
Regina DeWitt	6- 8-66		Pregnancy	
Marily Diamond	4-22-69		Pregnancy	
Judith Doane	4-30-69		Pregnancy	
Anne Dimott	5-23-69		Pregnancy	
Margaret Donlon	5-29-68		Pregnancy	
Elizabeth Dougherty	8-23-65		Pregnancy	
Rose Mary Dougherty	7-29-66		Pregnancy	
Jacquelyn Dow	11-22-65		Pregnancy	
DeeAnn Doxee	4- 6-66		Pregnancy	
Allison Doyle	5-21-68		Pregnancy	
Linda Dunbar	5-21-69		Pregnancy	
Celia Dunn	7-28-66		Pregnancy	
Verlee Dunn	12- 4-67		Pregnancy	
Jo A. Dwyer	8-13-69		Pregnancy	
Marilyn Echols	12-31-65		Pregnancy	
Donna Elliason Gallagher	10-18-68		Pregnancy	
Yvonne Elonick Trice	2-27-68		Pregnancy	
Renee Emery	3- 5-68		Pregnancy	
Marjorie Engelman	7-26-65		Pregnancy	
Roberta Enright	7- 7-67		Pregnancy	
Henrietta Ericson	8-30-68		Pregnancy	

Name	Last Day Worked	After 3/1/70	Reason for Removal From Flight Attendant Status	Comment
Manga Estes	6- 9-66		Pregnancy	
Carol Evans	7- 5-68		Pregnancy	
Rebecca Everitt	4- 4-69		Pregnancy	
Patricia Fairchild	6-11-68		Pregnancy	
Karen Falbo	10-11-66		Pregnancy	
Ellen Fasciano	1-26-66		Pregnancy	
Barbara Fields	6- 8-66		Pregnancy	
Janet Filip	2-15-67		Resignation	Unknown reason
Donna L. Fish	11- 1-68		Pregnancy	
Patricia A. Fleming	1-12-67		Pregnancy	
Claircine Fraser	4-10-69		Pregnancy	
Nancy Friedman	5- 2-68		Pregnancy	
Mary Frisch	1-29-69		Pregnancy	
Nancy Fulton	4-15-69		Pregnancy	
Judith Funtas	8- 3-65		Pregnancy	
Susan Gambatese	7-28-66		Pregnancy	
Karen Garcia	5-10-68		Resignation	Husband relocating at Ft. Lee, Va.
Valarie Gardner	5-18-66		Pregnancy	
Diane Gorman	8-11-67		Pregnancy	
Gay Germain	1-10-69		Pregnancy	Management employee
Diane K. Gibson	10-26-66		Pregnancy	
H. C. Giordano Keel	12- 6-68		Pregnancy	
Katherine Grayson	8-25-70	•	Pregnancy	Failed to return from maternity leave
Pamela Gruber	8-31-68		Pregnancy	
Karen Gilroy	12- 2-68		Pregnancy	
Susan Glotzer	4- 9-68		Pregnancy	Returned 5-9-68 after miscarriage
Judith Glueck	6- 2-69		Resignation	Unknown reason
Elizabeth Gonzales	8- 6-70	•	Resignation	Marriage—relocation to San Luis Obispo, California
Saundra Gordon	6-18-69		Pregnancy	
Lydia Gourvitz	7-14-68		Pregnancy	
Patricia Gray	7-10-68		Pregnancy	
Sharron Grashius	1- 8-67		Pregnancy	
Joy Guerber	4-30-69		Pregnancy	
Barbara Gunderson	9- 7-66		Pregnancy	
Carol Hafer	3-17-69		Pregnancy	
Muriel Hachadurian	8-11-64		Pregnancy	
Elizabeth Harris	9-17-64		Pregnancy	
Helene Hague	6-23-67		Resigned	
Kathleen Hallquest	3- 2-67		Pregnancy	

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Name	Last Day Worked	After 3/1/70	Reason for Removal From Flight Attendant Status	Comment
Edith Halpern	4-30-69		Pregnancy	
Meryle Hammatt	3-23-66		Pregnancy	
Virginia Hammar	11- 7-68		Pregnancy	
Linda Harley	4-11-67		Pregnancy	
Vicki Harris	3-28-67		Pregnancy	
Diane Harvey	12- 5-65		Pregnancy	
Betty Heisler	8- 6-65		Pregnancy	
Ruthann Heitzler	3- 4-68		Pregnancy	
Janice Herbert	8-29-66		Pregnancy	
Darlene Headlee	No information - See 7/2/75 affidavit of Doris Owen			
Suzanne Hessian	6-30-67		Pregnancy	
Linda Hickey	1-19-68		Pregnancy	
Sharon Hill	10- 3-67		Pregnancy	
Virginia Hirt	9- 1-69		Pregnancy	
Sally Holbrook	6- 5-67		Pregnancy	
Arlene Holland	9- 2-65		Pregnancy	
Carol Holmes	6-27-69		Pregnancy	
Nancy Houtcooper	6-13-69		Pregnancy	
Drucilla Howard	4-19-68		Pregnancy	
Patricia Howard	6- 6-68		Resignation	Personal—resigned while in training
Barbara Huling	2- 2-66		Pregnancy	
Nancy Hoonewell	5- 2-67		Pregnancy	
Martha Hunt	12- 6-68		Pregnancy	
Carole Hunter	11- 1-67		Pregnancy	
Delores Ingemunson	7- 7-68		Pregnancy	
Karen Jacobs	9-10-67		Resignation	Unknown reason
Judith Jacobson	1-10-69		Pregnancy	
Gabriela Jeppe	6-19-68		Pregnancy	
Cherianne Johnson	1-14-66		Pregnancy	
Corma R. Johnson	4-30-68		Pregnancy	
Karen L. Johnson	2-15-67		Pregnancy	
Rosemary Kafka	12- 6-67		Pregnancy	
Sally Ingmanson	4-30-68		Pregnancy	
Mary Kalert	11-10-66		Resignation	Unknown reason
Rosalie Kampmeier	1-30-69		Pregnancy	
Valerie Kapchinski	9-11-69		Pregnancy	
Halina Karavas	9-10-67		Pregnancy	
Sandra Karge	11-15-67		Pregnancy	
Kamille Karlson	6-18-67		Pregnancy	
Josephine Kavanagh	3-12-68		Pregnancy	
Carol Kehler	5-16-67		Pregnancy	
Terryl W. Kidd	No information—See 7/2/75 affidavit of Doris Owen			
Jean F. King	1- 2-67		Pregnancy	
Julia Kirby	No information—See 7/2/75 affidavit of Doris Owen			

Name	Last Day Worked	After 3/1/70	Reason for Removal From Flight Attendant Status	Comment
Nancy Kisseljack	7- 7-66		Pregnancy	
Erica Klein	11- 7-68		Pregnancy	
Sandra Knight	1- 4-67		Pregnancy	
Jacqueline Knott	8-23-68		Pregnancy	
Francie Knox	2-14-69		Pregnancy	
Jeanette Koestner	6-18-68		Pregnancy	
Carol Kropp	1-30-68		Resignation	Unknown reason
M. J. Kuhlman	9-21-66		Pregnancy	Never was a flight attendant
Sadie S. Lake	3-24-69		Pregnancy	
Joan Laux	12- 7-67		Pregnancy	
Sandra LaCroix	10- 2-65		Pregnancy	
J. C. Lake	No information—See 7/2/75 affidavit of Doris Owen			
Brunhilde Leeper	3- 5-69		Pregnancy	
Lorna Leonard	12-15-65		Pregnancy	
Diane Lichy	7-16-68		Pregnancy	
Elizabeth Lidstone	3-29-68		Pregnancy	
Rita Liedtke	1-31-68		Pregnancy	
Yolanda Lokey	1- 6-68		Pregnancy	
Beverly Lovejoy	3-25-68		Pregnancy	
Myra Lubeck	2- 3-66		Pregnancy	
Susan Madigan	10-28-68		Pregnancy	
Diana Manahan	8- 2-68		Pregnancy	
Sherry Mangan	2-21-68		Pregnancy	
Patricia Markou	8-22-66		Resignation	
Joan Martinez	7-16-69		Pregnancy	
Rosemarie Mattson	8-20-66		Pregnancy	
Patricia McCarthy	5-18-66		Pregnancy	
Barbara McCravey	9- 1-65		Resignation	Unknown reason
Esther McDermott	8-25-65		Pregnancy	
Lloreen McFadyen	3- 7-68		Pregnancy	
Dorothy McGargill	7-10-69		Pregnancy	
Helen McGauly	7-21-69		Pregnancy	
Joyce McGrath	6- 6-66		Pregnancy	
Judith McInerney	NONE			Active flight attendant since 5-21-62
Jean McIntosh	10-26-66		Pregnancy	
Elizabeth McNamara	8- 9-65		Personal leave of absence	Unknown reason
Patricia McNamara	6-18-68		Pregnancy	
Jill Meyer	2- 7-68		Pregnancy	
Deanna J. Meyer	5-23-67		Pregnancy	
Ellen Mildenberger	12-29-68		Pregnancy	
Pauline Miller	No information—See 7/2/75 affidavit of Doris Owen			

Name	Last Day Worked	After 3/1/70	Reason for Removal From Flight Attendant Status	Comment
Frances Minnozzi	8-31-68		Pregnancy	Management employee
Tamillee Moore	5- 7-69		Resignation	Husband wanted her to stay home
Patricia Moore	9- 5-68		Pregnancy	
Virginia Mitcham	10-16-66		Pregnancy	
Ann Molsky	7-12-66		Pregnancy	
Delores A. Moore	7-8-68		Pregnancy	
Carol Moran	10-27-68		Pregnancy	
Susan Moran	4-30-68		Pregnancy	
Patricia Morgan	8-26-68		Pregnancy	
Katherine Morvay	3- 1-66		Resignation	Unknown reason
Carol Munz	4- 1-66		Personal leave of absence	Unknown reason
Emily Murphy	12- 8-68		Pregnancy	
Ruth Muto	6-28-68		Pregnancy	
Frances Nevin	10-28-66		Pregnancy	
Nelda Newby	9-13-65		Pregnancy	
Dennece Newman	12- 2-66		Pregnancy	
Edeltraud Newman	10-13-68		Pregnancy	
Susan Newell	11-30-69		Pregnancy	
Gwendolyn Newton	5- 6-66		Pregnancy	
Judith Novinger	4-16-67		Pregnancy	
Jeannette Oaks	8-30-67		Pregnancy	
Carolyn S. O'Brien	9- 8-67		Pregnancy	
Karen L. O'Byrne (Shine)	6-19-69		Pregnancy	
Carol J. Olson	4- 8-68		Pregnancy	
Gail O'Shea	6-12-68		Pregnancy	
Barbara Overly	3- 2-66		Pregnancy	
Diane Paglio	5- 2-69		Pregnancy	
C. June Panaia	3-29-66		Pregnancy	
Anne Panettiere	6-11-69		Pregnancy	
Kathleen Pantos	6-24-69		Pregnancy	
Lydia Parker	6-13-69		Pregnancy	
Sandra Paul	11- 4-66		Pregnancy	
Nickcol Peters	9- 3-68		Resignation	Unknown reason
Lana Copeland Palmer	10-26-68		Pregnancy	
Jody A. Peterson	10- 7-67		Resignation	Unknown reason
Jo D. Peterson	7- 1-68		Pregnancy	
Thomasine Phillips	3-25-68		Pregnancy	
Barbara Poeum	7-31-67		Pregnancy	Management employee
Mary Pitko	12- 6-67		Pregnancy	
Theresa Poulton	6-28-69		Pregnancy	
Angela Price	11-16-68		Pregnancy	

Name	Last Day Worked	After 3/1/70	Reason for Removal From Flight Attendant Status	Comment
Frances Pritchett	6-30-65		Pregnancy	
Patricia Pyle	1-30-66		Pregnancy	
Barbara Porter	9-29-69		Resignation	Desires to remain at home
Elizabeth Prasek	6-30-68		Resignation	Does not wish to travel
Kay Piscitello	1- 9-67		Pregnancy	
Cynthia A. Quinn	4-21-68		Resignation	Adoption
Sabine Ralston	3-17-67		Resignation	Unknown reason
Linda Reichenstein	4- 6-68		Pregnancy	
Janice H. Reilly	3-14-67		Pregnancy	
Jacqueline Reyburn	1- 5-66		Pregnancy	
Jean A. Rice	11-19-70	*	Termination	Reduction in force
Bonnie Rickenbacher	6-20-66		Pregnancy	
Debby Riley	11-29-68		Pregnancy	Signed rehire waiver
Regina Roberts	7- 1-68		Resignation	Adoption
Sharon Roberts	1-23-68		Pregnancy	
Ingrid Robins	12- 9-69		Resignation	
Judith Rogers	10-19-66		Pregnancy	Signed rehire waiver
Patricia Roumpos	12- 5-66		Pregnancy	
Grace Romeo	11-18-66		Pregnancy	
Sandra Roth	3-31-69		Pregnancy	
Marcia Rowe	7-17-69		Pregnancy	
Susan Rudd	8- 6-66		Pregnancy	
Mary Ann Ryan	8- 9-67		Pregnancy	
Marsha Sanabria	5-26-69		Pregnancy	
Patricia Santini	12-12-68		Pregnancy	
Bonnie Scahill	7-24-67		Pregnancy	
Sharon Schlund	4-22-69		Pregnancy	
Rita Schmidt	10-18-67		Personal leave	Unknown reason
Ursula Schneider	12-12-66		Pregnancy	
Pamela Schoenwitz	10-10-66		Pregnancy	
Gay Schneiderman	3-27-69		Pregnancy	
Jeanne Schoenberger	12-16-65		Pregnancy	
Janet Schramm	1-30-66		Pregnancy	
Susan Schreib	6- 6-69		Pregnancy	
Bonnie Schwartzburg	7-17-65		Pregnancy	
Catherine Schutz	10-15-65		Pregnancy	
Ida Louise Scott	9-17-68		Personal	
Joanne Securro	6- 7-68		Pregnancy	
Mary Seeger	4- 1-69		Pregnancy	
Barbara Semanchik	5-24-67		Pregnancy	
Harriette Shaffner	8-29-66		Resignation	Adoption
Ann Shaughnessy	3- 3-67		Pregnancy	
Mary Ann Shaw	6-20-69		Pregnancy	

Name	Last Day Worked	After 3/1/70	Reason for Removal From Flight Attendant Status	Comment
June M. Sheetz	4-20-69		Pregnancy	
Ann Shepard	4-29-66		Pregnancy	
Cynthia Shipman	7-13-65		Pregnancy	
Karen Sikora	8-11-67		Pregnancy	
Nancy Sipe	5-24-67		Pregnancy	
Betty Smith	4-10-69		Pregnancy	
Margaret Smith	11- 1-66		Pregnancy	
Norine Smock	4-16-68		Pregnancy	
Ann Smyer	11-15-67		Pregnancy	
Joy Spieker	8-22-66		Pregnancy	
Maureen Spillane	11- 7-66		Pregnancy	
Signa Spohn	5-31-67		Pregnancy	
Barbara Spudeck	6-20-66		Pregnancy	
Shirley Stevens	1-21-68		Pregnancy	
Frances Stewart	12-11-66		Pregnancy	
Sandra Stewart	11-24-68		Pregnancy	
Marlene Stringer	9-19-66		Pregnancy	
Barbara Stuart	8-19-66		Pregnancy	
Sarah Suenram	8-30-68		Pregnancy	
Ruthann Steimetz	10-18-66		Resignation	Unknown reason
Patty Rae Sumner	1-17-67		Resignation	Unknown reason
Joyce Sutton	6-15-69		Pregnancy	
Hannelore Suydam	3- 6-68		Pregnancy	
Frances Swift	5-13-69		Pregnancy	
Karla Swiontek	3-31-69		Pregnancy	
Natalie Tar	2-23-67		Pregnancy	
Mary Telep	9-13-68		Pregnancy	
Francoise Terra	12- 4-67		Pregnancy	
Aloma Thomas	8-30-65		Pregnancy	
Charlotte Tiesman	12- 4-67		Pregnancy	
D. Traylor	No information—See 7/2/75 affidavit of Doris Owen			
Bridgette Tilg	11-19-68		Pregnancy	
Bonnie Tourville	6-19-67		Pregnancy	
Margaret Townsend	12- 1-66		Pregnancy	
Sharon Townsend	6-30-69		Pregnancy	
Mary Tranbargar	8-11-67		Pregnancy	
Patricia Tucker	3-16-69		Pregnancy	
Patricia Tuens	5-25-66		Pregnancy	
Judy Turpin	8-10-65		Pregnancy	
Barbara Tuttle	12-25-66		Pregnancy	
Catherine Ufferfilge	10-31-65		Pregnancy	
Ann Urbach	11- 1-67		Pregnancy	
Cathleen Vail	8-10-68		Pregnancy	
Annerose Valensi	4-29-68		Pregnancy	

Name	Last Day Worked	After 3/1/70	Reason for Removal From Flight Attendant Status	Comment
Cynthia Vanderford	7- 1-68		Pregnancy	
Suzanne Vandersluis	2-27-68		Pregnancy	
Marsha Via	9-12-68		Pregnancy	
Priscilla Voight	1- 3-68		Personal leave	To obtain ground position
Judy Wade	6-30-69		Pregnancy	
Patricia Wallace	5- 1-68		Pregnancy	
Pamela Wagner	2- 7-68		Pregnancy	
LaVern Wayman	6-14-68		Pregnancy	
Katherine Weiss	1-17-67		Pregnancy	
Jyette Wells	2-27-67		Pregnancy	
Nancy Wells	10-29-65		Pregnancy	
Patricia West	5- 7-69		Pregnancy	
Lois Williams	3-31-68		Pregnancy	
Mary Williams	10- 1-66		Pregnancy	
Rosemary Williams	1- 6-66		Resigned	Husband wanted her at home
Elizabeth Williamson	3-27-67		Pregnancy	
Marylynn Willow	10-21-69		Pregnancy	
Marcella Winterhalter	2- 3-69		Pregnancy	
Kerry Wobeser	3-31-67		Pregnancy	
Karen Wood	No information—See 7/2/75 affidavit of Doris Owen			
Cheri Woulfe	1- 7-69		Pregnancy	
Bonnie Yoder	7- 7-70	*	Termination	Concealment
Donna Wurtz	9-21-67		Pregnancy	
Jessica Zajicek	3- 6-69		Pregnancy	
Donna Zimmerman	4- 5-66		Pregnancy	
Sherianne Zinsner	3-18-68		Pregnancy	
Anne Zipes	8- 4-68		Pregnancy	
Elizabeth Zlatchin	8- 7-70	*	Pregnancy	Granted maternity leave
Bernadette Zola	7-13-65		Personal leave	Unknown reason
Sieglinde Ziegler	10-31-66		Resignation	Return to Germany
Marcia Deeter	5- 2-69		Pregnancy	Management employee
Donna Deftrerick	No information—See 7/2/75 affidavit of Doris Owen			
Martha De Trindad	12-18-70	*	Pregnancy	Granted maternity leave. Voluntary termination 9-17-71
Susan Towle	10- 4-69		Pregnancy	
Sherry Ogden Quinby	No information — See 7/2/75 affidavit of Doris Owen			
Brenna Schoeler	8-17-69		Personal leave	Unknown reason
Bryde Giles	5-10-66		Pregnancy	

Name	Last Day Worked	After 3/1/70	Reason for Removal From Flight Attendant Status	Comment
Linda Melton	10- 6-70	•	Pregnancy	Granted maternity leave. Failed to return
Bernadette Montemurro	5-24-67		Pregnancy	
Joanne E. Bach	2-20-70		Pregnancy	
Ethel Hosmer Bergwold	10- 4-71	•	Furloughed	Reduction in force
Gloria Bobski	11-21-68		Pregnancy	Management employee
Lynn A. Brooks	8-18-67		Pregnancy	
Maureen J. Connolly	8- 4-69		Pregnancy	
Kathleen Fountain	1-30-72	•	Pregnancy	Was never a Flight Attendant—Sr. File Clerk New York City Legal
Patsy Giles Havice	3-22-69		Pregnancy	
Janice Hall	3- 2-70	•	Pregnancy	Granted maternity leave
Mariann H. Hatches	12-16-69		Pregnancy	
Joan Iswall	No information—See 7/2/75 affidavit of Doris Owen			
Linda J. Kerr	6-29-70	•	Pregnancy	Granted maternity leave
Diane W. Lafata	5-31-70	•	Pregnancy	Granted maternity leave
Diane Moska	No information—See 7/2/75 affidavit of Doris Owen			
Janice B. O'Neill	6-19-70	•	Pregnancy	Granted maternity leave
Janet T. Sauer	6-15-70	•	Pregnancy	Granted maternity leave
Gilma Gi Gi Schmidt	10-11-68		Pregnancy	
Beatrice Jaacks Sultan	9-29-64		Pregnancy	
Linda Thomas	12-29-69		Pregnancy	Management employee
Edeltrand Kunz Tichy	10-15-69		Pregnancy	
Ruby Townsend	No information—See 7/2/75 affidavit of Doris Owen			
Jo Ellen Vogelgesang	11-17-69		Pregnancy	
Bette Williams	12-29-67		Resignation	To be full time housewife management employee
Alice G. Wright	6-28-69		Pregnancy	
Miriam Kulman Brown	6- 9-70	•	Pregnancy	Granted maternity leave. Returned 5-23-71
Ellen M. Harris	4- 7-66		Resignation	Unknown reason
Kathleen Mary Wood	No information—See 7/2/75 affidavit of Doris Owen			
Amy Shepard	5-19-69		Resignation	Unknown reason
Barbara Ruther	4-11-66		Resignation	Unknown reason
Pamela Wagner	Listed above			

Rec. No. 97

PORTIONS OF TWA EMPLOYMENT RECORD OF PATRICIA A. SANTINI

December 13, 1968

To the Hostess Department:

This is to notify you that due to pregnancy I am required by the company to submit my resignation from the hostess department.

At this time, I would also like to inform you that I shall be taking the twelve (12) months maternity leave of absence which the company allows the hostesses to take.

Respectfully Submitted,

/s/ Patricia A. Santini
Patricia A. Santini
Payroll No. 32431

Also, it may be necessary for Payroll Department to hold your paycheck for the period ending December 29, 1968 for final accounting purposes due to your termination.

We would like to take this opportunity to wish you success and happiness in the future.

/s/ Maribeth Endom
Maribeth Endom
Transportation Manager, Hostesses

cc: G. B. Koch
W. S. Borden
J. V. Dernedde
Payroll
Medical

TRANS WORLD AIRLINES, INC.

To: Pat Santini 32431
1895 Pacific Ave. No. 105
San Francisco, Calif.

From: Maribeth Endom
Int'l Airport
San Francisco
Date: December 27, 1968

Subject: Termination

This will confirm your resignation from the Hostess Department of TWA effective December 12, 1968, due to your pregnancy. As requested, you have been granted a twelve (12) month Maternity Leave of Absence to seek ground employment.

I would like to remind you that the life insurance portion of your policy may be converted to a personal policy if handled within thirty (30) days from the effective date of leave. You may personally contact a representative of the Connecticut General Life Insurance Company for this purpose.

For your information, you are due zero days vacation pay for 1967 and thirteen days vacation pay for 1968.

Attached is a listing of uniform equipment which should be returned as soon as possible after your effective date of leave. The items listed should be brought into the Hostess Office for inspection before being surrendered to Stores Department.

I would like to remind you that G-118s reflecting any non-routine expenses should be submitted as soon as possible. G-118s received by Payroll more than 60 days late require the approval of a Company official and if more than 90 days late will not be reimbursed.

Passes that you have in your possession that are valid for more than 30 days from your effective date of leave must be turned in to this office for re-issuance.

FOR NEW EMPLOYEE: Complete top line of EACH block except shaded areas.
FOR CHANGE OF STATUS: Fill in changed information only directly below item(s) to be changed. Make no entries for unchanged items or in shaded areas.

TRANS WORLD AIRLINES, Inc.
EMPLOYEE STATUS

☐ NEW HIRE ☐ STATUS CHANGE ☐ REHIRE ☒ LEAVE ☒ TERMINATION

② No. A920675

DATE PREPARED: ~~1/17/68~~ 2/10/71

REGISTER NUMBER	EMPLOYEE FIRST NAME	FIRST INIT	SEC. INIT	EMPLOYEE LAST NAME	BIRTH DATE MO	DAY	YR	SEX	ADDRESS NUMBER AND STREET	ADDRESS (APT., COURT, ETC.)	CARD CODE
32431	PATRICIA	P	A	SANTINI	03	02	42	F	1895 PACIFIC AVE	#104	1

ADDRESS CITY AND STATE	ZIP CODE	SOCIAL SECURITY NUMBER	W.C. DIV.		REPO STATE	EARNED STATE STATUS	DIV	INSUR.	ADDIT	FUND EXEMP.	CO. SENIORITY MO	DAY	YR	LONG. DATE MO	DAY	YR	VACATION DATE MO	DAY	YR	ADD. EXEMP. NO.	YR	OCC TAX		CARD CODE
SAN FRANCISCO CALIF	94109	311-42-4777	Y		CA	E00	1				06	11	62							00				2

EFFECTIVE DATE MO	DAY	YR	JOB NUMBER PRE	TITLE	GRD	MGMT ACCT	CAB ACCT	JOB I.D	M/S	SHIFT	PAY BASIS	BI-WEEKLY SEMI-MO.	MONTHLY OR HRLY BASE PAY	HOURLY ACC RATE	LOCATION	R/N	COST CENTER	CT TX STAT	CITY EXM	STATE EXM	FED EXM	M/S	NO HS	COMP CLASS	PAY PERIOD WRK MO	PER	YR	CARD CODE
07	15	68	3	188	CC	211	55240	03	F		N	026006	565.00	7.45	890	0	916	000		00	01	M		4	07	16	68	3

JOB SENIORITY MO	DAY	YR	PAY SENIORITY MO	DAY	YR	INCR DECR	MERIT	PROM	SERVICE	S C A	LONG. RATE	AMOUNT INC DECR	BACK PAY DAYS	O S A	OVS SER. PAY	OLSB PAY	CLD PAY	CREW CODE	FLT SEN	RET	CARD CODE
			07	19	62	A						9.21									4

LAST DAY WORKED MO	DAY	YR	LV EXPR DATE MO	DAY	YR	MED	TERMINATION PAY DAYS	HOL	OTHR	SHIFT	VAC	CARD CODE
8	12	68	12	11	69	E						5

COMPLETE FOR HOURLY CONTRACT PERSONNEL ONLY

ACT LEAD	START TIME	LCH	DAYS OFF	FUNC. CODE	REG CRD	CLK NO	COLONY

REMARKS: Employee granted twelve month maternity leave of absence pending transfer to ground position. Vacation earned 1967 taken, thirteen days accrued 1968. Eligible for rehire in any position for which qualified. All loan items returned. Failed to return from maternity leave

DUTIES FORMERLY PERFORMED BY: Flt Hostess

FORM W-4 ATTACHED: ☐ YES ☒ NOT REQUIRED

PRIOR
JOB TITLE: Flt Hostess — DEPARTMENT: Sales/Services
SECTION — LOCATION: San Francisco — PAY: $565.00 2/10/71

NEW
JOB TITLE — DEPARTMENT
SECTION — LOCATION — PAY

APPROVALS

Mgr. Inflight Services 1/17/68

Muriel Eden

TITLE — DATE — TITLE — DATE

FORM A-76-A (11-68) PRINTED IN U.S.A.

FOR NEW EMPLOYEE: Complete top line of EACH block except shaded areas.
FOR CHANGE OF STATUS: Fill in changed information only, directly below item(s) to be changed. Make no entries for unchanged items or in shaded areas.

TRANS WORLD AIRLINES, Inc.
EMPLOYEE STATUS

④ No. B 542020

☐ NEW HIRE ☐ STATUS CHANGE ☐ REHIRE ☐ LEAVE ☒ TERMINATION

DATE PREPARED: 2/10/71

REGISTER NUMBER	EMPLOYEE FIRST NAME	FIRST INIT	MID. INIT	EMPLOYEE LAST NAME	BIRTH DATE MO	DAY	YR	SEX	ADDRESS NUMBER AND STREET	ADDRESS (APT., COURT, ETC.)	CARD
[redacted]	PATRICIA	P	A	SANTINI	03	02	42	F	1895 PACIFIC AVENUE	#105	1

ADDRESS CITY AND STATE	ZIP CODE	SOCIAL SECURITY NUMBER	U.S. CITIZ	RESD STATE	EARNED STATE STATUS	DIV	INSUR	ADDIT	FUND DEDUC	CO. SENIORITY MO	DAY	YR	LONG. DATE MO	DAY	YR	VACATION DATE MO	DAY	YR	ADD EXEMP NO.	YR	OCC TAX	RES STATE EXM	FICA EX		CARD
SAN FRANCISCO CALIF	94109	111-42-4777	Y	[redacted]	[redacted]	1				06	11	62							00						2

EFFECTIVE DATE MO	DAY	YR	JOB NUMBER PRE	TITLE	SUF	MGMT ACCT	CAB ACCT	JOB I D	H S	SHIFT	CALL CODE	BI-WEEKLY SEMI-MO.	MONTHLY OR HRLY BASE PAY	HOURLY ACC RATE	LOCATION	R N	COST CENTER	CY TX STAT	CITY EXM	STATE EXM	FED EXM	M S	NO HS	CONC CLOSE	DATE FORM WRKD MO	DAY	YR	LOC DIV	CARD
07	15	69	3	100	00	211	55240	00	F		W	086006	565.00	7.65	890	0	916	000		00	01	M	4		07	16	68		3

JOB SENIORITY MO	DAY	YR	PAY SENIORITY MO	DAY	YR	INCR DECR	MERIT	FROM	SERVICE	S C A	LONG RATE	AMOUNT INC. DECR	BACK PAY DAYS	D S A	OVS SER. PAY	OLSB PAY	CLD PAY	CREW CODE	FLT SEN	RET		CARD
			07	12	62	A						9.21										4

STATUS	LAST DAY WORKED MO	DAY	YR	LV EXPR DATE MO	DAY	YR	RSN	TERMINATION PAY DAYS	HOL	OTHR	SHIFT	VAC	CARD CODE
B	12	12	68	12	11	69	R						5
R	12	12	68				E						

COMPLETE FOR HOURLY CONTRACT PERSONNEL ONLY

ACT LEAD	START TIME	LCH	DAYS OFF	FUNC. CODE	REG CRD	CLK NO	COLONY

REMARKS: Failed to return from maternity leave of absence.

DUTIES FORMERLY PERFORMED BY: _____

FORM W-4 ATTACHED: ☐ YES ☒ NOT REQUIRED

PRIOR
JOB TITLE _____ DEPARTMENT _____
SECTION _____ LOCATION _____ PAY _____
APPROVALS

NEW
JOB TITLE _____ DEPARTMENT _____
SECTION _____ LOCATION _____ PAY 10 38 X
APPROVALS

_____ TITLE Mgr. In-Flight Services 2/10/71 TITLE _____ DATE _____

Marilyn Endom TITLE _____ DATE _____ TITLE _____ DATE _____

FORM A-76-A (8-69)

PRINTED IN U.S.A.

Rec. No. 86

* * (Caption—No. 70 C 2069) * *

MEMORANDUM OPINION AND ORDER

(American Airlines Defendant)

(Entered April 28, 1976)

This cause comes before the Court on plaintiffs' motion for summary judgment. The complaint alleges that, prior to October 9, 1970, women employed by defendant American Airlines, Inc., ("American") as flight cabin attendants ("stewardesses") were forced to resign or were discharged when they became pregnant, and were refused opportunity to continue in their positions as stewardesses at any time following their pregnancies. The complaint further alleges that, during the time in question, defendant American did not terminate the employment of its male employees who fathered children. Plaintiff challenges American's policy and practice of terminating the employment of its stewardesses upon pregnancy and refusing to rehire said stewardesses after pregnancy (hereinafter referred to as the "no pregnancy/no motherhood policy") as violative of Title VII of the Civil Rights Act (42 U. S. C. § 2000e, *et seq.*).

There seems to be no question concerning the basic facts of the case as elicited from the various pleadings, affidavits and discovery documents. Prior to October 9, 1970, stewardesses who became pregnant were terminated from employment and, thereafter, could not serve as American stewardesses.[1] However, during the same period of time, American did not have a policy limiting the employment opportunities of male flight crew members who were parents.

Plaintiffs and defendant both rely on the Supreme Court's per curiam opinion in *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542 (1971). In *Phillips*, the Court said, "Section 703(a)

[1] After this suit was filed, through collective bargaining, the no pregnancy/no motherhood policy was abandoned and, since October 9, 1970, female parents have been employed by American as stewardesses.

of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex." 400 U. S. 542, 544.

Plaintiffs rely on the Court's statement for affirmance of the establishment of a prima facie case against defendant for violation of § 703(a) of the Civil Rights Act. Defendant, however, argues that pregnant females do not have the same qualifications as men or non-pregnant females to do the work of stewardesses. Thus defendant urges this Court that plaintiffs have not shown a violation of § 703(a). The Court agrees that pregnant women do not have the same qualifications as men or as non-pregnant women to work as flight cabin attendants. The Court accepts as non-discriminating the policy that pregnant women should not work as stewardesses. And like plaintiffs, the Court sees no problem with American's present policy of requiring a stewardess to take a leave of absence immediately upon confirmation of her pregnancy. However, the issue in this case is not whether pregnant women are qualified to serve as stewardesses. The issue is whether female parents as a class have been subjected to employment impediments to which male parents have not been subjected. The Court finds from the uncontroverted facts that female parents were subjected to such impediments in this instance; and based on the Supreme Court's decision in *Phillips* v. *Martin Marietta Corp., supra,* the Court finds that such discrimination establishes a violation of § 703(a). See also, *Cleveland Board of Education* v. *La Fleur,* 414 U.S. 632 (1974), and *Sprogis* v. *United Air Lines, Inc.,* 444 F. 2d 1194 (7th Cir. 1971), *cert. denied,* 404 U. S. 491 (1971). The defendant's reliance on *Geduldig* v. *Aiello,* 417 U. S. 484 (1974) and *Willingham* v. *Macon Co. Telegraph,* 507 F. 2d 1084 (5th Cir. 1975), is misplaced.

Although plaintiffs have established a violation of § 703(a), the question still remains whether summary judgment can be granted on the issue of defendant's liability. The defendant asserts that, through its affidavits and various exhibits, it has

raised a factual issue as to whether or not defendant's no pregnancy/no motherhood policy is excluded from § 703(a) by virtue of the bona fide occupational qualification exemption under § 703(e). That section provides that:

"... [I]t shall not be an unlawful employment practice for an employer to hire and employ employees ... in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business ..." 42 U. S. C. § 2000e-2(e).

In *Sprogis* v. *United Air Lines, Inc., supra,* the Seventh Circuit found that a bona fide occupational qualification is established under § 703(e):

"... if and only if, that requirement reflects an inherent quality reasonably necessary to satisfactory performance of the duties of stewardesses. By its very terms, the narrow exception in § 703(e)(1) calls for employers to treat their employees as individuals." 444 F.2d at 1199.

Thus the Court finds that a business necessity rather than a business convenience test must be applied in establishing a bona fide occupational qualification. The depositions of defendant's officers make it clear that there is no rational justification for American's no motherhood policy. These depositions reveal that female parents have been operating as safe flight personnel since American abdicated its no motherhood policy in 1970; that the health status of flight crew members can only be established on an individual basis, rather than a class basis; and that, since the abdication of the policy, female parents have not caused American operating problems.

In an attempt to counteract the admissions of its officers, defendant seeks to raise factual issues with regard to its qualification for a § 703(e) exemption. The Court has examined defendant's affidavits and various exhibits, but has found them insufficient to establish a genuine issue of material fact. The Alford affidavit is based largely on belief rather than

personal knowledge and fails to set forth sufficient facts to raise a material issue. The Lederer affidavit refers primarily to the dangers of pregnant women continuing to work as stewardesses. This issue is not before the Court. The remaining affidavits do not provide sufficient facts to establish a genuine issue as to whether or not defendant's policy might qualify for a bona fide occupational qualification exemption.

Thus the Court finds that defendant American has failed to establish a genuine issue of material fact concerning whether or not its no motherhood policy is necessary for the operation of its business. Therefore, the Court finds that defendant did not qualify for the § 703(e) exemption, and thus defendant's no pregnancy/no motherhood policy was violative of § 703(a) of the Civil Rights Act. Plaintiffs' motion for summary judgment is granted on the issue of liability only. A decision on plaintiffs' further request for appointment of a master to facilitate a fashioning of remedies is deferred until the questions concerning the scope and membership of the plaintiffs' class are resolved.

Enter:

/s/ Frank J. McGarr
United States District Judge

Dated: April 28, 1976

Rec. No. 93

* * (Caption—No. 70 C 2071) * *

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Filed July 9, 1976)

Now come the plaintiffs, by their attorneys, and move this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for entry of summary judgment in favor of plaintiffs, finding that the defendant's policy violates Title VII of the Civil Rights Act of 1964 (42 U. S. C. 2000(e) et seq.).

In support of this motion, plaintiffs state that there is no genuine issue as to any material fact and that plaintiffs are entitled, as a matter of law, to the relief requested.

Charles Pressman,
One of the Attorneys for Plaintiffs

Rec. No. 99

* * (Caption—Nos. 70 C 2069, 70 C 2071) * *

MEMORANDUM OPINION AND ORDER

(Entered October 19, 1976)

On November 18, 1974, The Honorable Richard J. McLaren issued a memorandum opinion and order allowing defendants Trans World Airlines, Inc. and American Airlines, Inc. to amend their answers to include the "affirmative defense" of the statute of limitations contained in 42 U. S. C. § 2000e-5e. This statute imposed a ninety-day period after an alleged unlawful practice within which a charge could be filed with the Equal Employment Opportunity Commission. Judge McLaren noted and left open the question of whether defendants' delay in pleading the defense of limitations constituted a waiver of the defense.

Defendants are now moving to exclude certain persons of plaintiffs' class for lack of subject matter jurisdiction, urging that Title VII's time limits are not a matter of defense but are,

rather, jurisdictional prerequisites not subject to waiver by the actions of the defendants. Factually, they are seeking to exclude all persons whose employment was terminated on the grounds of pregnancy more than ninety days prior to May 31, 1970, the date of filing by the original plaintiff-union, Air Line Stewards and Stewardesses Association, Local 550.

Several courts have recently considered the question of whether Title VII's time limits are in the nature of statutes of limitations or jurisdictional prerequisites, and have concluded the former. *Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F. 2d 924 (5th Cir. 1975); *Dartt* v. *Shell Oil Co.*, ____ F. 2d ____, 13 FEP Cases 12 (10th Cir. 7/22/76); 408 F. Supp. 229 (D. Conn. 1976).

The Seventh Circuit, however, has characterized the issue as jurisdictional. *Choate* v. *Caterpillar Co.*, 402 F. 2d 357 (7th Cir. 1968); *see* also *Evans* v. *United Air Lines, Inc.*, 534 F. 2d 1247 (7th Cir. 1976); *McGuire* v. *Aluminum Company of America*, ____ F. 2d ____, No. 76-1013 (7th Cir. 9/9/76). This court is persuaded that the Seventh Circuit holding is correct and that the time requirements of Title VII are jurisdictional in nature.[1]

Having so decided, the next question for resolution is whether the claims of certain class members are time-barred. Defendants' motion is grounded upon the assumption that the violation occurred at the moment of termination due to pregnancy and, therefore, the ninety days began to run for each class member at that moment. Plaintiffs, on the other hand, assert the existence of a "continuing violation" which existed at least until the airlines abandoned their policy of refusing to rehire mothers.

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[1] Plaintiffs urge that this court should estop the defendants from raising the jurisdictional question. E.g., *DiFrischia* v. *New York Central Railroad*, 279 F. 2d 141 (3rd Cir. 1960). Because of the view we take of this case, we need not reach this extraordinary estoppel question.

We agree with the plaintiffs' view of this action. If this case sought only to challenge the policy of firing pregnant stewardesses, we would agree that the ninety-day limit began to run the moment of termination. But, as noted in our memorandum opinion and order dated April 28, 1976, this case challenges a policy much more broad than that. It challenges the "no motherhood" policy which begins at pregnancy, yet continues to prevent the re-hiring of the alleged class members once pregnancy is at an end. Thus, we find a continuing violation of plaintiffs' rights which existed until the time that defendants changed the challenged policy.[2] *See, Boudreaux* v. *Baton Rouge Marine Contracting Co.,* 437 F. 2d 1011 (5th Cir. 1971); *Macklin* v. *Spector Freight Systems, Inc.,* 478 F. 2d 979 (D. C. Cir. 1973). Because of the essential difference between the parties as to the nature of the violation here, and the court's agreement with the plaintiffs' position, defendants' authorities do not compel a different result.[3]

For the foregoing reasons, defendants' motion to exclude certain persons from the class for lack of subject matter jurisdiction is hereby denied.

/s/ Frank J. McGarr
United States District Judge

Dated: October 15, 1976

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[2] We note further, although we do not base our holding today thereon, plaintiffs' allegations that the effects of the discriminatory policy continued past that date as to all stewardesses who are not rehired pending the outcome of this case because they failed to waive their claims to back-pay. The allegation with respect to back-pay appears to be within the scope of *Evans* v. *United Airlines, Inc., supra.* Perpetuation of a disadvantage suffered because of a past discrimination is itself a violation thereunder.

[3] We have considered, too, the Memorandum of Movants for Intervention in Reply to Plaintiffs' Memorandum in Response to Defendants' Motion to Exclude Certain Persons From the Class. The memorandum is directed basically towards a final remedy in this case and against various allegations made by plaintiffs with respect to this predecessor union's good faith. That memorandum does not call for a different result within the context of this motion.

Rec. No. 99

* * (Caption—70 C 2071) * *

MEMORANDUM OPINION AND ORDER

(Entered October 19, 1976)

Plaintiffs have moved for summary judgment pursuant to Rule 56, Fed. R. Civ. P. on the issue of liability of defendant Trans World Airlines (TWA), for violation of Title VII of the Civil Rights Act (42 U. S. C. § 2000e, et seq.) The complaint alleges that prior to 1970, women employed by defendant TWA as flight attendants were forced to resign or were discharged when they became pregnant, and were refused opportunity to continue in their positions as stewardesses at any time following their pregnancies. This policy and practice of TWA, the complaint alleges, did not apply to male flight personnel employed by the defendant.

On April 28, 1976, this court granted summary judgment for the plaintiffs in the related case against American Airlines (No. 70 C 2069). Plaintiffs' motion for summary judgment herein is based on this court's ruling in the *American* case. Plaintiffs allege that the facts and circumstances are the same in this action as in that against American, and that, therefore, the court's ruling in that case and the authority cited therein should be controlling in this action. Defendants, on the other hand, claim that the circumstances are not the same and have filed affidavits and abstracts of the depositions of various TWA personnel alleging that there are factual issues which would preclude the court's granting of summary judgment for the plaintiffs.

The court has reviewed the memoranda filed by both parties and the exhibits filed by the defendant. The court agrees with the plaintiffs that the issues in this case are controlled by the court's previous opinion and the authority cited therein. In

accordance with the previous opinion and order, the court finds defendant TWA's "no motherhood" policy violative of § 703(a) of the Civil Rights Act, 42 U. S. C. § 2000e-2(a). Furthermore, the court finds that defendant's exhibits, based largely on opinion and hearsay rather than fact, fail to raise a genuine issue of material fact concerning defendant's claim for a bona fide occupational qualification under § 703(e) of the Civil Rights Act, 42 U. S. C. § 2000e-2(e).

For the foregoing reasons, plaintiffs' motion for summary judgment on the issue of TWA's liability for violation of Title VII of the Civil Rights Act is granted.

Enter:

/s/ Frank J. McGarr
United States District Judge

Dated: October 18, 1976

Rec. No. 106

* * (Caption—No. 70 C 2071) * *

ORDER

(Entered December 16, 1976)

Enter amendment to order that the orders entered on October 18, 1976 granting summary judgment against Trans World Airlines, Inc. and on October 15, 1976 denying Trans World Airline's motion to exclude are amended by adding the following to each order: This court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 24, 1978

Before

Hon. Thomas E. Fairchild, *Chief Judge*
Hon. Wilbur F. Pell, Jr., *Circuit Judge*
Hon. Robert A. Sprecher, *Circuit Judge**

In Re:
CONSOLIDATED PRETRIAL PROCEEDINGS IN THE AIRLINE CASES,

No. 77-1325

Appeal of:
AMERICAN AIRLINES, INC., and TRANS WORLD AIRLINES, INC.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division.

Nos. 70-C-2069, 74-C-2063
70-C-2071, 74-C-2762
72-C-498

Frank J. McGarr, Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the district court properly granted summary judgment in favor of the plaintiffs; and the order of October 15, 1976 is VACATED and REMANDED, in accordance with the opinion of this court filed this date. Each party shall bear its respective costs.

* Although Judge Sprecher heard oral argument, he later disqualified himself from any participation in the decision, and preparation of the opinion, in this case.